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In the Supreme Court of the United States

OCTOBER TERM, 1994

FBT BANCSHARES, INC.
PETITIONER

versus

MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY, INC., (IN REHABILITATION)
RESPONDENT

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA FROM THE ORDER DATED DECEMBER 13, 1994

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

QUESTION NUMBER 1

DOES THE RULING OF THE PENNSYLVANIA SUPREME COURT, DENYING FBT'S[1] DIRECT APPEAL WITHOUT REASONS, CONFLICT WITH THIS COURT'S DECISION IN *AMERICAN IRON & STEEL MANUFACTURING v. SEABOARD AIR LINE RAILWAY,* 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed 949 (1914) AND ITS PROGENY?

QUESTION NUMBER 2

DOES THE RULING OF THE PENNSYLVANIA SUPREME COURT, REFUSING (*SUB SILENTIO*) TO GIVE FULL RECOGNITION TO A FINAL LOUISIANA JUDGMENT, CONFLICT WITH THIS COURT'S DECISION IN *MORRIS v. JONES,* 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed 488 (1947) AND DEPRIVE FBT OF RIGHTS GUARANTEED BY ARTICLE 4 §1 OF THE UNITED STATES CONSTITUTION, KNOWN AS THE "FULL FAITH AND CREDIT" CLAUSE?

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[1] Throughout this application, the reference to petitioner, FBT Bancshares, Inc., will be "FBT". Compliance with Rule 29.1 is found at page 2, *infra*.

QUESTIONS PRESENTED FOR REVIEW (continued)

QUESTION NUMBER 3

BY ENFORCING, (*SUB SILENTIO*), AN ADMINISTRATIVE PLAN UNDER STATE LAW WHICH ELIMINATED, WITHOUT CONSIDERATION, NINE YEARS OF JUDICIAL INTEREST, DID THE PENNSYLVANIA SUPREME COURT **DEPRIVE FBT OF RIGHTS GUARANTEED BY ARTICLE 1, §10 OF THE UNITED STATES CONSTITUTION, KNOWN AS THE "IMPAIRMENT OF CONTRACTS" CLAUSE?**

QUESTION NUMBER 4

BY DENYING THE DIRECT APPEAL OF FBT WITHOUT REASONS, DID THE PENNSYLVANIA SUPREME COURT **VIOLATE OTHER CONSTITUTIONAL RIGHTS GUARANTEED BY THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION, INCLUDING (a) THE GUARANTY AGAINST RETROACTIVE APPLICATION OF SUBSTANTIVE LAW, (b) THE ENFORCEMENT OF STATE LAW WHICH (AS TO FBT) WAS "UNCONSTITUTIONAL AS APPLIED" AND (c) THE ARBITRARY FAILURE TO APPLY CONTROLLING PENNSYLVANIA LAW?**

TABLE OF CONTENTS

Page (s)

Questions Presented for Review i

Table of Contents iii

Table of Authorities iv

Opinions Delivered in the Case by Other Courts 1

Statement of Jurisdiction 1

Constitutional Guarantees Applicable to this Case 2

Compliance with Rule 29.1 2

Statement of the Case 2

A. Course of Proceedings and Disposition in Courts Below 2

B. Statement of Facts 5

Argument and Law 8

Conclusion 19

Appendix A A-1
Appendix B A-4
Appendix C A-6
Appendix D A-14
Appendix E A-58
Appendix F A-60
Appendix G A-66
Appendix H A-69

TABLE OF AUTHORITIES

CASES **Page(s)**

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 98 S.Ct. 2716, 57 L.Ed.2d 727 (1978) 14

American Iron & Steel Manufacturing Co. v. Seaboard Air Line Railway, 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 949 (1914) .....*passim*

Association of PA. State College v. State System, 479 A.2d 962 (Pa. 1984) 16

Barium Steel v. Wiley, 379 Pa. 38, 108 A.2d 336 (1954) 14

Board of Governors v. First Linchwood Corp., 439 U.S. 234, 58 L.Ed.2d 484, 95 S.Ct. 505 (1978) 2

Fountleroy v. Lum, 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed 1039 (1908) 12

Foster v. The Mutual Fire, Marine and Inland Insurance Company, 531 Pa.598, 614 A.2d 1086 (1992) *cert. denied sub nomine Allstate Insurance Company v. Maleski*, 506 U.S. ____, 113 S.Ct. 1047, 122 L.Ed 2d 356 (1993) and *cert. denied sub nomine Republic Insurance Group v. Maleski*, 506 U.S. ____, 113 S.Ct. 1066, 122 L.Ed 2d 371 (1993) .....*passim*

Homebuilding and Loan v. Blaisdell, 290 U.S. 398 54 S.Ct 231, 78 L.Ed.413 (1934) 15

TABLE OF AUTHORITIES (continued)

CASES **Page(s)**

In Re Sublett, 895 F.2d 1381 (11th Cir. 1990) 11

In Re D. C. Sullivan & Co., Inc., 929 F.2d (1st Cir. 1991) 11

In Re: Upset Sales Tax Claim Bureau of Burks, 479 A.2d 940 (Pa. S.Ct. 1984) 10

Mathews v. Eldridge, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed2d 18 (1976) 17

Morris v. Jones, 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed. 488 (1947) ..... *passim*

Ohio Association, etc. v. PERS, 585 N.E.2d 597 (Ohio Com.Pl.,1990) 16

Roche v. McDonald, 275 U.S. 449, 48 S.Ct. 142, 77 L.Ed 365 (1927) 12

Sanders v. Loomis Armored, Inc., 614 A.2d 320 (Pa.Super. 1992) 16

Ticonic Nat. Bank v. Sprague, 303 U.S. 406, 58 S.Ct. 612, 82 L.Ed 926 (1938) 9,10

TABLE OF AUTHORITIES (continued)

CASES **Page(s)**

Vanston Bondholders Protective Com. v. Green, 329 U.S. 156, 67 S.Ct. 237, 91 L.Ed 162 (1946) 10

Verner v. Shaffer, 500 A.2d 479 (Pa.Super.1985) 14

Yick Wo v. Hopkins, 188 U.S. 356, 6 S.Ct. 1064, 30 L.Ed 220 (1886) 4,17

CONSTITUTIONAL CLAUSES

Full Faith and Credit Clause, Article 4 §1, United States Constitution .....*Passim*

Impairment of Contracts Clause, Article 1, §10, United States Constitution .....*Passim*

Due Process Clause, 14th Amendment, United States Constitution .....*Passim*

OPINIONS DELIVERED IN THE CASE BY OTHER COURTS

1. On November 10, 1993, the Commonwealth Court of Pennsylvania rendered an unreported memorandum opinion, a full copy of which is included as Appendix C, A-6 - A-13.

2. On December 13, 1994, on direct appeal from the Commonwealth Court to the Pennsylvania Supreme Court, the Pennsylvania Supreme Court entered the following unreported Per Curiam Order as to FBT's appeal, Appendix E, A-58 - A-59:

"Order of the Commonwealth Court affirmed."

STATEMENT OF JURISDICTION

Petitioner seeks review by way of a Petition for Writ of Certiorari to a judgment rendered, in a direct appeal, by the Supreme Court of Pennsylvania, M.D. Appeal Docket, 1993, on December 13, 1994.

Jurisdiction of this Honorable Court is invoked under the provisions of Title 28 U.S.C. § 1257 and Rule 10.1(c) of the Rules of the Supreme Court of the United States, which provides for the granting of a Writ of Certiorari, *inter alia*, when:

> "...A state court...has decided a federal question in a way that conflicts with applicable decisions of [the Supreme] Court."

CONSTITUTIONAL GUARANTEES APPLICABLE TO THIS CASE

(1) ***The Full Faith and Credit Clause,*** Article 4 §1 of the United States Constitution.

(2) ***The Impairment of Contracts Clause,*** Article 1 §10 of the United States Constitution.

(3) ***The Due Process Clause,*** 14th Amendment to the United States Constitution.

COMPLIANCE WITH RULE 29.1

FBT Bancshares, Inc. is a Louisiana Corporation formed pursuant to the Bank Holding Company Act of 1956. It owned 100% of Fidelity Bank and Trust Company. Because of the losses which led to the judgment of the Louisiana Courts, Federal regulators issued a capital call which FBT could not meet[2]. Accordingly, Fidelity was merged into Bank of Louisiana on April 30, 1988. *FBT has no subsidiaries or assets except the Louisiana Judgment sought to be given Full Faith and Credit herein.*

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Courts Below

On June 28, 1990, the 22nd Judicial District Court for the Parish of St. Tammany, State of Louisiana, entered

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[2] A Bank Holding Company is required to be a "...source of strength..." to its bank. *Board of Governors v. First Linchwood Corp.*, 439 U.S. 234, 58 L.Ed.2d 484, 95 S.Ct. 505 (1978).

Judgment in favor of FBT and against Mutual Fire, Marine and Inland Insurance Company, Inc. ("Mutual") "*...in the full and true sum of ONE MILLION DOLLARS* ***together with legal interest from date of judicial demand until paid*** *and for all costs...*" (Appendix A @ A-2). After the judgment was affirmed by the First Circuit Court of Appeal for the State of Louisiana on December 27, 1991, Mutual filed for supervisory writs to the Louisiana State Supreme Court, which denied certiorari on September 4, 1992. (Appendix B @ A-4)

On February 8, 1993, FBT filed a motion for summary judgment with the Commonwealth Court of Pennsylvania[3], seeking recognition and enforcement of its Louisiana Judgment. On November 10, 1993, the Commonwealth Court for the State of Pennsylvania granted FBT's motion for summary judgment in part, recognizing FBT's entitlement to One Million Dollars, but DENIED FBT's entitlement to interest under the Louisiana Judgment, notwithstanding this Court's decisions in *American Iron & Steel Manufacturing v. Seaboard Air Line Railway,* 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 949 (1914), and *Morris v. Jones,* 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed. 488 (1947).

Pursuant to the provisions of Section 723 of the Pennsylvania Judicial Code, 42 Pa.C.S. §723, FBT took a direct appeal to the Pennsylvania Supreme Court, raising, *inter alia,* five federal questions:

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[3] Because Mutual was placed in Rehabilitation by the Commissioner of Insurance on December 4, 1986, the Commonwealth Court of Pennsylvania, normally an appellate Court, had original jurisdiction with appeals being taken directly to the Pennsylvania Supreme Court. See, *Foster v. The Mutual Fire, Marine and Inland Insurance Company,* 531 Pa.598, 614 A.2d 1086 (1992) *cert. denied sub nomine Allstate Insurance Company v. Maleski,* 560 U.S. ____, 113 S.Ct. 1047, 122 L.Ed 2d 356 (1993) and *cert. denied sub nomine Republic Insurance Group v. Maleski,* 560 U.S. ____, 113 S.Ct. 1066, 122 L.Ed 2d 371 (1993).

(a) Violation of FBT's rights under ***The Full Faith and Credit Clause,*** Article 4 §1, United States Constitution; (Appendix D @ A-24, A-31, A-50)

(b) Violation of FBT's rights under ***The Impairment of Contracts Clause,*** Article 1 §10, United States Constitution; (Appendix D @ A-23, A-47)

(c) Violation of FBT's rights under ***The Due Process Clause,*** Amendment 14, United States Constitution; (Appendix D @ A-23, A-44)

(d) Violation of FBT's rights against ***The Retroactive Application of Substantive Law,*** Amendment 14, United States Constitution; (Appendix D @ A-24, A-51) and

(e) Violation of FBT's rights against the imposition of state law which is, as to FBT, was "***...unconstitutional as applied...***", *Yick Wo v. Hopkins,* 188 U.S. 356, 6 S.Ct. 1064, 30 L.Ed 220 (1886), and its progeny. (Appendix D @ A-23, A-50)

After all issues were briefed[4], the Supreme Court ruled on FBT's direct appeal without hearing argument and without giving reasons for its decision. On December 13, 1994, the following Per Curiam Order was entered:

"Order of the Commonwealth Court affirmed."

From the Judgment of the Pennsylvania Supreme Court FBT respectfully files this application for a Writ of Certiorari.

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[4] In addition to the five federal issues set forth above, FBT raised serious issues under state law (Appendix D @ A-22, A-32-A-41). For Purposes of this writ application, however, FBT only addresses violations of rights, privileges and immunities guaranteed by the United States Constitution.

B. Statement of Facts.

FBT is a Louisiana Bank holding company which owned only one asset, The Fidelity Bank and Trust Company ("Fidelity"). From 1982 through 1984, Fidelity's president, Charles Faler, violated his fiduciary duty to the bank and to FBT by making loans without Board approval or in violation of Board approval, resulting in losses of $1,730,297.61.

FBT's sued Mutual under a Directors and Officers Liability Policy on August 19, 1986. On September 13, 1986, the Commissioner of Insurance for the State of Pennsylvania issued a suspension order as to Mutual, and on December 4, 1986, appointed a rehabilitator. Notwithstanding the Pennsylvania rehabilitation proceedings, Mutual actively and vigorously defended against FBT's claim in the Louisiana courts. Mutual neither requested a stay nor relief from the imposition of judicial or "legal" interest required by Louisiana law.

In the interim, the FDIC called for a capital infusion which FBT could not meet, resulting in Fidelity's merger into Bank of Louisiana in 1988. FBT has no assets other than the Louisiana Judgment which Pennsylvania has refused to fully recognize.

On June 11, 1990, the trial court in the Louisiana proceedings heard motions and cross-motions for summary judgment, based on stipulated and/or undisputed facts. There was no dispute that damages exceeded the policy limits of $1 Million. The legal dispute was over coverage. On June 28, 1990, the District Court ruled in favor of FBT and against Mutual. A subsequent appeal to the First Circuit Court of Appeal was unsuccessful, as was Mutual's application for writs to the Louisiana State Supreme Court, which denied writs on September 4, 1992. At that point, the Louisiana judgment became final.

On August 21, 1992, the Pennsylvania Supreme Court decided the matter of *Foster v. Mutual, supra*, confirming a modified Plan of Rehabilitation. In so ruling, the Pennsylvania Supreme Court held that the Plan did not violate Article 1 §10 of the United States Constitution by impairing contract rights because any actual impairments to a policyholder were deemed to be "insubstantial". *Foster, supra*, at 1094. Additionally, the Pennsylvania Supreme Court dealt with a judgment in favor of Pepsi-Cola Bottling Company, and affirmed the rehabilitator's right to limit or deny judicial interest[5], citing *American Iron & Steel v. Seaboard, supra*, at footnote 13. The Pennsylvania Supreme Court reasoned that the denial of interest was not a violation of The Full Faith and Credit Clause of the United States Constitution because interest is ultimately due when all claims of equal dignity are paid in full. Pursuant to the Plan itself, its effect would not take place until an order of approval was final. Two creditors, All-State Insurance Company and Republic Insurance Group applied to this Court for writs, both of which were denied on January 19, 1993. 113 S.Ct. @ 1047 and 1066.

On October 15, 1992, Mutual attempted to avail itself of the Plan of Rehabilitation, which allowed Mutual to "adjust" claims by issuing so-called "Notices of Determination". After having lost in the Louisiana courts ***at all three levels***, Mutual notified FBT that it "valued" FBT's claim at $350,000. FBT objected on the grounds that all issues between FBT and Mutual were *res judicata* and on the grounds that the Pennsylvania Commonwealth Court was required to give full faith and credit to the Louisiana Judgment. (Appendix H @ A-70)

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[5] The Plan did *not* "prohibit" the payment of interest. See n. 22, Appendix D @ A-33 and n. 45, Appendix D @ A-54.

On February 8, 1993, FBT filed a motion for summary judgment with the Commonwealth Court, ultimately resulting in that Court's November 10, 1993 decision, finding that the United States Supreme Court's ruling in *Morris v. Jones, supra*, was controlling, but that the payment of interest awarded by the Louisiana Judgment was *not* binding upon that Pennsylvania Court.

While FBT's direct appeal to the Pennsylvania Supreme Court was pending, Mutual announced that it had sufficient funds to pay *all* Class 4 or "policyholder" claims[6]:

> "In December, 1994, the Rehabilitator declared that sufficient collections had been made to pay all adjusted Class 4 claims in full and to adequately reserve for unadjusted Class 4 claims pursuant to Section VI of the Plan."

In a subsequent declaration regarding the success of the rehabilitation, Rehabilitator Alexander Bratic predicted that Mutual "...would emerge as a functioning insurance company..." fully rehabilitated. (Appendix G @ A-68)

The Pennsylvania Supreme Court, (a) without hearing oral argument, (b) without considering the success of the rehabilitation, and (c) without giving *any* reasons, affirmed the Commonwealth Court's November 10, 1993 decision *in six words:*

> *"Order of the Commonwealth Court affirmed."*

FBT waited almost one decade to be paid[7]. Now that

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[6] ¶4 of Appendix F @ A-62. ***FBT's claim is a Class 4 claim.***

[7] FBT had to file a separate motion to require Mutual to pay the principal amount of $1 Million. On November 23, 1994, the Commonwealth Court so ordered and payment was received by FBT on January 6, 1995.

all claims of "equal dignity" have been paid (or will be paid), FBT is constitutionally entitled to interest on the money which Mutual has used since 1986. For all intents and purposes, FBT has had no "meaningful appeal" and respectfully requests that this Court grant certiorari to protect FBT's rights, privileges and immunities as guaranteed by the United States Constitution and as provided by 28 U.S.C. §1257(a).

ARGUMENT AND LAW

QUESTION NUMBER 1

DOES THE RULING OF THE PENNSYLVANIA SUPREME COURT, DENYING FBT'S DIRECT APPEAL WITHOUT REASONS, **CONFLICT WITH THIS COURT'S DECISION IN *AMERICAN IRON & STEEL MANUFACTURING v. SEABOARD AIR LINE RAILWAY,* 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed 949 (1914) AND ITS PROGENY?**

Because the Pennsylvania Supreme Court handed down no reasons, we must conclude that it *rejected* FBT's argument that, at the very least, FBT was owed interest on its judgment when all Class 4 claims were paid. This argument was based on footnote 13 of the Pennsylvania Supreme Court's decision in *Foster v. Mutual, supra,* which specifically relied upon this Court's ruling in *American Iron & Steel v. Seaboard, supra.*

In that case, this Court held that in a receivership, where the assets of the insolvent are *in custodia legis,* the payment of interest would be delayed, ***but never eliminated,*** stating, at 504:

> "...in case funds are not sufficient to pay *claims of equal dignity,* the distribution is made only on the basis of the principal of the debt. *But that rule did not prevent the running of interest during the receivership;* and if, as a result of good fortune or good management, the estate proves sufficient to discharge the claims in full, *interest as well as principal should be paid.*"

This makes it clear that interest does accrue. The question left is what are "claims of equal dignity?" In that regard, this Court held that it is not necessary that claims of "lower rank" be paid in full in order for a higher ranking claim to receive the interest due, stating at 34 S.Ct. 505:

> "The principle is not limited to cases of technical bankruptcy, where the assets ultimately prove sufficient to pay all debts in full, but principal as well as interest, accruing during a receivership, is paid on debts of the highest dignity, *even though what remains is not sufficient to pay claims of a lower rank in full.*" [Citations omitted]

In answering affirmatively to the question which was certified by the Fourth Circuit Court of Apeals[8], this court concluded that the payment of interest was "...but an incident of that debt..." *Id.* @ 505. In the case at bar, the judicial interest is also "...but an incident of the judgment..."

Cases decided by this Court subsequent to *American Iron & Steel* consistently adopt the proposition that an obligation to pay interest is "...not destroyed by insolvency..." *Ticonic Nat. Bank v. Sprague,* 303 U.S. 406, 58 S.Ct.

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[8] The question certified was: "Is interest recoverable on such a claim (a sale of supplies on 30 days credit) for the period of the receivership?" *Id.* @ 503.

612 (1938). In that case, this Court also held that a lienholder was entitled to have his lien satisfied "...not only for the principal but also for the interest accruing up to the date of payment, though his debtor has gone into bankruptcy (citations omitted)." *Id.* at 615.

In the case at bar, FBT reduced its claim to a judgment, which constitutes a lien upon all of the property of the debtor, including equitable interests and beneficial interests. 42 Pa. C.S.A. §§ 1722(h), 2737(3), and 4303 (a)(h). See, *In Re: Upset Sales Tax Claim Bureau of Burks,* 479 A.2d 940 (Pa. S.Ct. 1984). Pursuant to this Court's holding in *Ticonic Nat. Bank, supra,* FBT is entitled to look to the assets of Mutual for ***both*** principal ***and*** interest. This is particularly true where the rehabilitation has been successful and all Class 4 claims have been (or will be) paid.

In *Vanston Bondholders Protective Com. v. Green,* 329 U.S. 156, 67 S.Ct. 237, 91 L.Ed 162 (1946), this Court held that "...each decision on allowance of interest in bankruptcy, receivership and reorganization has been a balance of equities between...creditors and debtor..." *Id. @* 241. Here, we alerted the Pennsylvania Supreme Court of the fact that the rehabilitator had in excess of $183 Million invested *and earning interest*[9]. Notwithstanding the glut of cash which Mutual has on hand and notwithstanding FBT's impecunious state, the Pennsylvania Supreme Court "balanced" no equities.

Subsequent to *Vanston, supra,* courts have consistently recognized the "solvency exception" to any rule

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[9] See, footnote 41 of FBT's brief to Pennsylvania Supreme Court, pointing out that by the time Mutual paid FBT the $1 Million in principal, Mutual had earned $1.2 Million on the money which belonged to FBT.

regarding the suspension (but not the elimination) of interest during insolvency proceedings. *In Re Sublett,* 895 F.2d 1381 (11th Cir. 1990), citing *American Iron & Steel, @* 1386 and *In Re D.C. Sullivan & Co., Inc.,* 929 F.2d 1 (1st Cir. 1991), citing *American Iron & Steel* @3.

Because the Pennsylvania Supreme Court ruling leaves FBT no right to be paid interest when all claims "...of equal dignity..." have been paid, or when Mutual emerges from this rehabilitation as a "...functioning insurance company...", the judgment below is in conflict with this Court's decisions in *American Iron & Steel* and its progeny.

QUESTION NUMBER 2

DOES THE RULING OF THE PENNSYLVANIA SUPREME COURT, REFUSING (*SUB SILENTIO*) TO GIVE FULL RECOGNITION TO A FINAL LOUISIANA JUDGMENT, CONFLICT WITH THIS COURT'S DECISION IN *MORRIS v. JONES,* 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed 488 (1947) AND DEPRIVE FBT OF RIGHTS GUARANTEED BY ARTICLE 4 §1 OF THE UNITED STATES CONSTITUTION, KNOWN AS THE "FULL FAITH AND CREDIT" CLAUSE?

The Commonwealth Court properly determined that this Court's decision in *Morris v. Jones, supra,* was binding and that the Full Faith and Credit Clause of the United States Constitution required Pennsylvania to recognize the Louisiana Judgment. (Appendix C @ A-9). The Commonwealth Court then "split" the judgment as to interest,

a form of relief which Mutual did *not* request in the Louisiana Courts. In *Morris v. Jones, supra,* this Court held that defenses to that judgment were required to be raised in the underlying case and that the underlying judgment was *res judicata* as to any defenses "...which could have been raised..." *Id.* @ 552. Mutual could have, *but did not* , raise any alleged prohibition against the award of interest in the Louisiana Courts. When the judgment was rendered and included the language:

> "...together with legal interest from date of judicial demand until paid..."

Mutual could have objected, ***but did not!*** The crux of rulings of the Commonwealth and Supreme Courts of Pennsylvania is that enforcement of that *aspect* of the Louisiana Judgment was "incongruous" with Pennsylvania law as interpreted by the Pennsylvania Supreme Court in *Foster v. Mutual, supra.* This Court, however, has often held that a judgment of one state must be enforced in another state even though the judgment would *not* have been granted in the second state because it was "...repugnant to its own statutes." *Morris v. Jones, supra,* @ 551; *Roche v. McDonald,* 275 U.S. 449, 48 S.Ct. 142, 77 L.Ed. 365 (1927) @ 454, citing *Fauntleroy v. Lum,* 210 U.S. 230, 28 S.Ct. 641, 52 L.Ed 1039 (1908).

FBT is protected (a) by Article 4 §1 of the United States Constitution, (b) by the doctrine of *res judicata,* and (c) by Pennsylvania law under *Preclusion* and *Merger*[10] from having to relitigate its entitlement to interest. *Morris v. Jones, supra,* did not give the Pennsylvania Commonwealth Court or the Pennsylvania Supreme Court the right to "split" FBT's judgment because the payment of

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[9] These state-law issues were fully briefed to the Pennsylvania Supreme Court @ Appendix D, A-32 - A-41. The rulings below constitute an arbitrary failure to apply controlling state law.

interest may have been repugnant to or "incongruous" with Pennsylvania law. The Louisiana judgment is entitled to *full* faith and credit, **not 45% faith and credit.**[11]

This Court has always been the ultimate guardian of the Full Faith and Credit Clause of the United States Constitution and Certiorari should be granted.

QUESTION NUMBER 3

BY ENFORCING, (*SUB SILENTIO*), AN ADMINISTRATIVE PLAN UNDER STATE LAW WHICH ELIMINATED, WITHOUT CONSIDERATION, NINE YEARS OF JUDICIAL INTEREST, DID THE PENNSYLVANIA SUPREME COURT **DEPRIVE FBT OF RIGHTS GUARANTEED BY ARTICLE 1, §10 OF THE UNITED STATES CONSTITUTION, KNOWN AS THE "IMPAIRMENT OF CONTRACTS" CLAUSE?**

Article 1 of the United States Constitution, Section 10 provides that "No State shall...pass any...law impairing the obligation of contracts.." This Court has consistently interpreted that clause as prohibiting "substantial" impairment of contractual obligations and has held that "The severity of an impairment of contractual obligations can be measured by the factors that reflect "...**the high value the**

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[11] The Louisiana Judgment is worth approximately $2.2 Million. The $1 Million which Mutual has paid equals 45% of the total amount due.

Framers (of the United States Constitution) placed on the protection of private contracts..." *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 98 S.Ct. 2716 (1978), 57 L.Ed.2d 727.

Originally, the Pennsylvania Supreme Court held that the Plan was *not* unconstitutional on its face, finding that any impairments were "insubstantial". *Foster v. Mutual, supra,* at footnote 4. Moreover, the Pennsylvania Supreme Court's rationale in finding that the Plan was not an unconstitutional impairment of contract rights was based, in part, on the fact that a typical claimant would receive "... proportionate periodic payments..." *Foster, @* 1090. Under Pennsylvania law, interest is awarded as compensation for "...the use or detention of a plaintiff's property by the defendant...", *Verner v. Shaffer,* 500 A.2d 479 (Pa.Super.1985), citing *Barium Steel v. Wiley,* 379 Pa. 38, 108 A.2d 336 (1954).

Mutual, however, made no periodic payments to FBT and FBT was compelled to file a separate motion to require payment of the principal amount due under the Louisiana Judgment. Thus, FBT has received no *quid pro quo* which would justify, constitutionally, an impairment which measures approximately $1.2 Million.

The Pennsylvania Supreme Court did not measure the impact of the impairment upon FBT. The Commonwealth Court equated FBT to Pepsi Cola, notwithstanding that FBT lost the Fidelity Bank & Trust Company in the process and has no assets other than this litigation[12].

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[12] On July 3, 1990, FBT filed a hardship application which it withdrew after it filed the motion for summary judgment granted by the Commonwealth Court November 10, 1993.

More importantly, neither the Commonwealth Court nor the Pennsylvania Supreme Court measured the severity of the impairment *in view of Mutual's present financial condition.* The resolution of issues under the Contract Clause is not a simple task. As this Court held in *Homebuilding & Loan v. Blaisdell,* 290 U.S. 398, 54 S. Ct 231, 78 L.Ed.413 (1934), regarded as the leading case in the modern era of Contract Clause interpretation, "...Every case must be determined upon its own circumstances..." *Id.* @ 430.

FBT is no Pepsico. The impairment is "substantial" to FBT, and Certiorari should be granted.

QUESTION NUMBER 4

BY DENYING THE DIRECT APPEAL OF FBT WITHOUT REASONS, DID THE PENNSYLVANIA SUPREME COURT **VIOLATE OTHER CONSTITUTIONAL RIGHTS GUARANTEED BY THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION, INCLUDING (a) THE GUARANTY AGAINST RETROACTIVE APPLICATION OF SUBSTANTIVE LAW, (b) THE ENFORCEMENT OF STATE LAW WHICH (AS TO FBT) WAS "UNCONSTITUTIONAL AS APPLIED" AND (c) THE ARBITRARY FAILURE TO APPLY CONTROLLING PENNSYLVANIA LAW?**

(a) Retroactive Application of Substantive Law. Section 1 (12) of the plan defines the effective date of the plan as "...The date on which this Plan *is approved by final Order...*" At best, the "final order" approving this plan did not occur until August 21, 1992, the date *Foster, supra,* was decided. That decision was the subject of two writ applications denied by this Court on January 19, 1993. By this time, the FBT judgment had long reached finality. The decision of the First Circuit Court of Appeals for the State

of Louisiana, denying Mutual's request for reconsideration was handed down March 13, 1992. That was Mutual's last right of appeal. The denial of certiorari by the Supreme Court of Louisiana made the FBT judgment final as of March 13, 1992. *FBT's judicial interest was a* ***vested property right*** before the effective date of the Plan.

The imposition of an administrative plan, effective on a date substantially later than the date of FBT's vesting, amounts to a prohibited "retroactive" application of law. This concept is fundamental. In *Ohio Association, etc. v. PERS,* 585 N.E.2d 597 (Ohio Com.Pl.,1990) that court held, at 601:

> "*An administrative rule,* having the force and operation of a statute, *which extinguishes or impairs a vested legal relationship,* creates a new obligation, imposes a new duty or attaches a new disability to previous transactions constitutes a *retroactive enactment* and results in a deprivation of property without due process of law." See also, *Association of PA. State College v. State System,* 479 A.2d 962 (Pa. 1984).

The same analysis is applicable here. In *Sanders v. Loomis Armored, Inc.,* 614 A.2d 320 (Pa.Super. 1992), the Pennsylvania Superior Court held, at 322:

> "Laws which are applied retroactively offend the due process clause if, 'balancing the interests of both parties, such application would be unreasonable.' *Id.* Retroactive laws which have been deemed reasonable are those which '***impair no contract and disturb no vested right,*** but only

> [vary] remedies, cure defects in proceedings otherwise fair, *and do not vary existing obligations* contrary to their situation when entered into and prosecuted.' (Citations omitted).

In the case at bar, the denial of interest based on an administrative plan which did not become "effective" until ***after FBT was vested with a property right*** constitutes a retroactive application of substantive law prohibited by the Due Process Clause of the United States Constitution.

(b) "Unconstitutional as Applied". While the decision of the Commonwealth Court seemingly adopted the Pennsylvania Supreme Court's determination that the Plan was *not* unconstitutional on its face, to the extent that FBT is deprived of approximately $1.2 Million in interest, the consequences of the plan are *not* "insubstantial" and the plan, although constitutional on its face, becomes "*unconstitutional as applied*". *Yick Wo v. Hopkins,* 188 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) and its considerable progeny.

(c) Arbitrary Failure to Apply Controlling Law. In our brief to the Pennsylvania Supreme Court we cited controlling state law regarding the doctrines of *Preclusion* and *Merger,* which hold that interest is merged into a judgment and that "splitting" of interest from principal in a judgment is prohibited. The administrative plan imposed upon FBT to deprive it of interest ignores controlling Pennsylvania and Louisiana law and thereby violates due process requirements. This Court, in *Mathews v. Eldridge,* 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed.2d 18 (1976), has noted

that due process "...is not a technical conception with a fixed content unrelated to time, place and circumstances..." and that due process "...calls for such procedural protection as the particular situation demands." *Id.* @ 902. Dealing with an administrative process, as here, this Court defined the scope of inquiry as follows:

> "Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient ***requires analysis of the governmental and private interests that are affected.***" [Emphasis Ours]

FBT's "private interest" is clear. FBT, which began in a hardship status, can hardly afford the loss of interest due. The original claim was for $1,730,997 for losses incurred in 1984 and 1985. FBT will *never* be made whole because the policy it purchased had a $1 Million limit. The Commonwealth Court's judgment, denying FBT interest, means that FBT will recover less than 26.3% of the present value of its *actual* losses. Thus, the "private interest" affected here is hardly "insubstantial."

Mutual's stake in this claim, on the other hand, is *de minimis.* Liquid assets approach $200 Million. "Settled Losses Remaining to Distribute" are but $54 Million. It appears that Mutual is near full rehabilitation, if not already rehabilitated. Thus, in comparing the "private interests" of FBT to the "governmental interests" of this rather well-heeled rehabilitation, the denial of ***FBT's vested property rights*** is a denial of due process of law. Certiorari is warranted on various constitutional grounds.

CONCLUSION

The only reason the Pennsylvania Commonwealth Court did not enforce the interest awarded by the Louisiana Courts is because Pepsico was denied interest. FBT is hardly Pepsico and the impairment of FBT's contract rights is hardly "insubstantial".

The Pennsylvania Supreme Court did not fulfill its duty to uphold the United States Constitution and in affirming the Commonwealth Court's order, without reasons, denied FBT of rights, privileges and immunities guaranteed by (a) the Full Faith and Credit Clause of the United States Constitution, (b) the Impairment of Contracts Clause of the United States Constitution, and (c) The Due Process Clause, incorporated into the United States Constitution by the 14th Amendment.

The Pennsylvania Supreme Court's "ruling" is in direct conflict with this Court's decisions in *American Iron and Steel, supra,* and *Morris v. Jones, supra,* and other Supreme Court authorities cited herein.

Pursuant to Title 28, U.S.C. §1257 and Rule 10.1(c) of the Rules of this Court, Certiorari should be granted.

Respectfully submitted:

HENRY L. KLEIN, ESQ.
Bar No. 7440
844 Baronne Street
New Orleans, LA 70113-1103
(504) 586-9971

APPENDIX A

22ND JUDICIAL DISTRICT COURT
FOR THE PARISH OF ST. TAMMANY

STATE OF LOUISIANA

NO. 86-11418

DIVISION "A"

FBT BANCSHARES, INC., ET AL

VERSUS

MUTUAL FIRE, MARINE AND
INLAND INSURANCE COMPANY, ET AL

FILED: June 28, 1990 S/MARGARET M.McLAIN
DEPUTY CLERK

J U D G M E N T

This matter came for hearing on June 11, 1990, on Motions for Summary Judgment filed by all defendants regarding coverage; a Cross-motion for Summary Judgment filed by FBT Bancshares, Inc. regarding coverage; and a Motion for Summary Judgment by FBT Bancshares, Inc. regarding Liability and Quantum.

Based on the stipulations of the parties, based on the

concessions of the parties at oral argument and for the reasons set forth in this Court's written reasons for Judgment, dated June 26, 1990, the following Judgment is rendered:

IT IS ORDERED, ADJUDGED AND DECREED that the Motion of FBT Bancshares, Inc for reformation of the policy, deleting FBT Bancshares Inc. as a named insured be and the same is hereby GRANTED, and that the policy No. 100067, issued by Mutual Fire, Marine & Inland Insurance Company to Fidelity Bank & Trust Company on December 20, 1983, be and the same is hereby REFORMED to exclude and delete FBT Bancshares, Inc. as a named insured;

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion of FBT Bancshares, Inc. on Liability and Quantum be and the same is hereby GRANTED, and that there be Judgment herein in favor of FBT Bancshares, Inc. and against Mutual Fire, Marine & Inland Insurance Company in the full and true sum of ONE MILLION ($1,000,000) DOLLARS, together with legal interest from date or judicial demand until paid, and for all costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the various motions of defendants for Summary Judgment as to Fidelity Bank and Trust Company be and the same are hereby GRANTED, and that there be Judgment herein, dismissing the First, Second, Third and Fourth petitions of Fidelity Bank and Trust Company, with prejudice, at Fidelity Bank and Trust Company's cost.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the various motions for Summary Judgment filed by defendants as to coverage be and the same are hereby declared MOOT as a consequence of the Reformation of the policy ordered herein.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the First, Second and Third petitions of FBT Bancshares, Inc. against defendants Evanston Insurance Company; Shand, Morahan and Company; Alexander & Alexander, Inc.; and Vivien Insurance Company, Inc., alleging a Cause of Action under LSA - R.S. 22:1262 be and the same are hereby DISMISSED, without prejudice, reserving unto FBT Bancshares, Inc. the right to refile, in the event that the Rehabilitator of Mutual Fire, Marine & Inland Insurance Company does not render said causes of action MOOT by virtue of payment.

JUDGMENT READ, RENDERED AND SIGNED, in open Court, on the 28 day of June, 1990, at Covington, Louisiana.

/s/ France W Watts

J U D G E

A TRUE COPY

/s/ Margaret M. McLain

DY. CLERK 22nd JUD. DIST COURT
ST. TAMMANY PARISH, LA.

APPENDIX B

The Supreme Court of the State of Louisiana

FBT BANCSHARES INC. ETAL

VS. NO. 92-C - 1078

MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY ET AL

- - - - - -

IN RE: Mutual Fire Marine, Inl.Ins.Co.; - Defendant(s); Applying for Writ of Certiorari and, or Review; to the Court of Appeal, First Circuit, Number CA90 1958; Parish of St. Tammany Twenty-Second Judicial District Court Div. "A" Number 86-11418

- - - - - -

September 4, 1992

Denied.

WFM

PFC

JLD

JCW

LEMMON, COLE & HALL, JJ., would grant the writ.

Supreme Court of Louisiana
September 4, 1992

/s/ Franz J. LaBranche, Jr.

Clerk of Court
For the Court

APPENDIX C

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

GEORGE F. GRODE, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA Plaintiff	:	
v.	:	No. 3483 C.D. 1986
THE MUTUAL FIRE, MARINE & INLAND INSURANCE COMPANY, Defendant	:	

IN THE MATTER OF FBT
BANCSHARES' CLAIM

MEMORANDUM OPINION BY
SENIOR JUDGE LORD

FILED: November 10, 1993

FBT Bancshares (FBT) has filed a Motion for Summary Judgment against the Rehabilitator of Mutual Fire, Marine & Inland Insurance Company (Mutual Fire).

This case presents but one of many claims which are part of the Rehabilitation of Mutual Fire. The history of this rehabilitation is found in *Grode v. The Mutual Fire,*

Marine and Inland Insurance Company, 132 Pa. Commonwealth Ct. 196, 572 A.2d 798 (1990) which upheld with modifications the fashioning of a rehabilitation plan that was, in turn, affirmed, modified and remanded to this Court in *Foster v. The Mutual Fire, Marine and Inland Insurance Company,* 531 Pa. 598, 614 A.2d 1086 (1992) *cert. denied sub nom Allstate Insurance Company v. Maleski,* ____ U.S. ____, 113 S. Ct. 1047, 122 L.Ed.2d 356 (1993) and *cert. denied sub nom Republic Insurance Group v. Maleski,* ____ U.S. ____, 113 S.Ct. 1066, 122 L.Ed.2d 371 (1993). The original supervision order in this case was entered September 13, 1986. In December 1986, the Insurance Commissioner, after her appointment as rehabilitator, submitted a rehabilitation plan. Objections were heard and, after many hearings and negotiations with various creditors, an amended plan was submitted, which plan was, after hearing and consideration of further objections, modified by this Court and approved on January 23, 1990. This Court's decision was affirmed as modified by the Pennsylvania Supreme Court on August 21, 1992.

This action by FBT was filed August 19, 1986 in Louisiana against Mutual Fire and others seeking a judgment in the sum of $103,700.00. In essence, it sought recovery on a policy issued by Mutual Fire which allegedly insured FBT for the defalcations of its directors. On September 15, 1986 (two days after the supervision order) FBT's claim was amended to increase that claim to more than $1,700,000 against Mutual Fire. On June 20, 1988, Mutual Fire answered the claim. On February 27, 1989, FBT filed its proof of claim with the rehabilitator. Thereafter, on June 20, 1990, the 22nd Judicial District Court, Parish of Tammany, State of Louisiana, entered

judgment.[1]

Motions for a new trial were heard and denied, an appeal was taken and, after argument on December 27, 1991, the First Circuit Court of Appeals of Louisiana affirmed the judgment and denied an application for rehearing on March 3, 1992. Writs of Certiorari to the Louisiana Supreme Court were requested. The writs were denied on September 4, 1992.

Throughout the proceeding Mutual Fire was represented by counsel and defended the action largely on a question of non-coverage. Mutual Fire never sought a stay of those proceedings based on the proposition that the Commonwealth Insurance Commissioner's suspension order or the court-approved rehabilitation plan protected Mutual Fire from suits and provided for a method of disposing of all claims.

FBT in this Motion for Summary Judgment seeks to obtain a judgment against Mutual Fire for $1,000,000 plus interest. The amount of the policy involved is $1,000.000.

---

[1] The motion for summary judgment unfortunately does not contain a certified copy of such judgment. There is, however, a partly legible copy of the judgment attached to FBT's hardship petition which has subsequently been withdrawn. Rather than deny the motion for summary judgment with leave to amend it, we verified the copy of the judgment with the clerk of the Louisiana court. It reads in pertinent part: "IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion of FBT Bancshares, Inc. on Liability and Quantum be and the same is hereby GRANTED, and that there be Judgment herein in favor of FBT Bancshares, Inc. and against Mutual Fire, Marine & Inland Insurance Company in the full and true sum of ONE MILLION DOLLARS together with legal interest from date of judicial demand until paid and for all costs."

Full Faith and Credit

This question is easily decided. The Supreme Court of the United States has ruled on a similar situation in *Morris v. Jones*, 329 U.S. 545 (1947), *rehearing denied*, 330 U.S. 859 (1947).[2] In that case, as in this case, the receivership court in Illinois had before it a judgment acquired in an out-of-state (Missouri) court against an Illinois insurance company after a liquidator for the insurance company had been appointed in Illinois. The Illinois Supreme Court held that the liquidator was not required to recognize such a judgment. Justice Douglas, writing for the United States Supreme Court, reversed and held that the Full Faith and Credit Clause[3] required recognition of the judgment by the Supreme Court of Illinois.

Mutual Fire argues at some length that the automatic stay provisions of the Insurance Commissioner's supervision order and the rehabilitation order of this Court should prevail, and that the Louisiana court should have been bound by this Court's orders, which were issued before the entry of FBT's original judgment on June 28, 1990. (The supervision order was entered on September 13, 1986; the proposed order of rehabilitation was filed on December 4, 1986 and a plan of rehabilitation was approved on January 23, 1990.) We disagree with Mutual Fire's contention, for *Morris v. Jones* has answered that argument also.

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[2] Curiously, although FBT makes a full faith and credit argument, it does not cite this case.

[3] U.S. CONST. Article IV, §1.

> As to respondent's contention that the Illinois decree, of which petitioner had notice, should have been given full faith and credit by the Missouri court, only a word need be said. Roche v. McDonald, makes plain that the place to raise that defense was in the Missouri proceedings. And whatever might have been the ruling on the question, the rights of the parties could have been preserved by a resort to this Court, which is the final arbiter of questions arising under the Full Faith and Credit Clause. In any event the Missouri Judgment is res judicata as to the nature and amount of petitioner's claim as against all defenses which could have been raised.

Id. at 552 (citations omitted).

We hasten to add that the fact that we grant the motion for summary judgment does not give FBT any priority over any other creditors with respect to distribution other than the priority accorded by the plan, for in *Morris* the Supreme Court said:

> We do not suggest that petitioner by proving his claim in judgment form can gain a priority which he would not have had if he had to relitigate his claim in Illinois. And, as we have said, there is not involved in this case any rule of distribution which departs from the principle of parity as between Illinois creditors and creditors from other States.

Id. at 554 (citations omitted).

We reach a different conclusion, however, with respect to the interest claimed by FBT. As to this claim, we are bound by a decision of the Supreme Court of Pennsylvania when it approved and modified the rehabilitation plan. *Foster.* The Supreme Court had before it a federal judgment in favor of Pepsi-Cola Bottling of Charlotte, North Carolina, Inc., entered on September 4, 1986, one week before the suspension of Mutual Fire's business and three months before the Commissioner filed the petition for rehabilitation. The federal judgment in favor of Pepsi-Cola awarded interest from May 21, 1986. Our Supreme Court only allowed interest until the December 4, 1986 filing date of the rehabilitation plan, the date the Insurance Commissioner "invoked her equitable powers." *Id.* at 629, 614 A.2d at 1102.

In the instant case, FBT did not obtain its judgment until more than 3 years after December 4, 1986 and under no circumstances could we justify awarding interest on such judgment when Pepsi-Cola was denied interest beyond the date the Commissioner invoked her equitable powers on a judgment which antedates suspension. Such a result would be in direct conflict with the holding of the Pennsylvania Supreme Court and would be unreasonable, unsound and incongruous.[4]

With respect to FBT's argument that the denial of interest is a violation of the full faith and credit clause, we quote the Supreme Court of Pennsylvania's opinion in

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[4] As we have stated above, on February 27, 1989, FBT filed its proof of claim. It is, therefore, at the very least a fair inference that FBT was well aware of the rehabilitation and the Court's consideration of the plan. It could have appeared as did Pepsi-Cola to contest aspects of the plan. It did not and we could hold that this failure bars FBT from raising the question now.

Foster at footnote thirteen.

> This result, we believe, properly satisfies the results of applicable case law. Under the Full Faith and Credit Clause, Article Four, Section One of the United States Constitution, and an implementing statute, 28 U.S.C. Section 1738, Pepsi's federal court judgment is to be accepted by the states as conclusive proof of the rights adjudicated. See Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134, 83 L.Ed. 104, reh'g denied, 305 U.S. 675, 59 S.Ct. 250, 83 L.Ed. 437 (1938). The result of disallowing the payment of interest on Pepsi's judgment for any period beyond the date the Petition of Rehabilitation was filed is also consistent with those decisions wherein courts have held that interest accruing on claims after insolvency proceedings have begun is payable only after the principal on all claims have been paid in full. American Iron and Steel Manufacturing Co. v. Seaboard Air Line Railway, 233 U.S. 261, 266, 34 S.Ct. 502, 504, 58 L.Ed. 949 (1914); Commw. ex rel. Woodside v. Seaboard Mutual Casualty Co., 420 Pa. 237, 215 A.2d 673 (1966).

Id. at 629, n. 13.

We also conclude that a contrary result, allowing interest on FBT's judgment when it has been disallowed in instances of other judgment creditors, would run afoul of the dictates of *Morris v. Jones* (see, *inter alia*, citation p. 5, *supra*), requiring parity between in-state creditors and those of other states.

We will therefore enter judgment for FBT for $1,000,000 and deny any claim for interest.

/s/ Charles A. Lord

CHARLES A. LORD, Senior Judge

APPENDIX D

IN THE
SUPREME COURT OF PENNSYLVANIA

NO. 116 M.D. Appeal Docket 1993

CYNTHIA M. MALESKI, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA

VERSUS

THE MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY (IN REHABILITATION)

Appellee and Cross-Appellant

ADVERSUS

FBT BANCSHARES, INC.

Appellant and Cross-Appellee

BRIEF FOR APPELLANT-CROSS APPELLEE

Appeal from the Order dated November 10, 1993
of the Commonwealth Court
No. 3483 C.D. 1986

HENRY L. KLEIN, *pro hac vice*
and PERRY S. BECHTLE
Counsel for Appellant and Cross-Appellee, FBT Bancshares, Inc.

LABRUM & DOAK
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TABLE OF CONTENTS

PAGE NO(S):

TABLE OF AUTHORITIES ii

STATEMENT OF JURISDICTION 1

STATEMENT OF QUESTIONS INVOLVED 2

STATEMENT OF THE CASE 4

SUMMARY OF ARGUMENT 8

ARGUMENT AND LAW 12

CONCLUSION 33

CERTIFICATE OF SERVICE 34

TABLE OF AUTHORITIES

PAGE NO(S):

American Iron & Steel Manufacturing v. Seaboard Airline Railway, 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed 949 (1917) 21

Anshutz v. J. Ray McDermott, 642 F.2d 94 (5th Cir. 1981) 16

Altoona Vo-Tech Ed. Assoc. v. Altoona Vo-Tech School, 559 A.2d 974 (Pa.Cmwlth.1989, Pallandino, J.) 14,25

Association of PA. State College v. State System, 479 A.2d 962 (Pa. 1984) 31

Barium Steel v. Wiley, 379 Pa. 38, 108 A.2d 336 (1955) 27

Central Trust Co. v. Condon, 14 C.C.A. 314, 31 U.S. App. 387, 67 Fed. 84 22

Cloonan v. Thornburgh, 519 A.2d 1040 (Pa.Cmwlth. 1986, *Crumlish, J.*) 25

Coleman v. Coleman, 522 A.2d 1115 (Pa.Super. 1987, Beck, J.) 19,25

Colorado River Water Assn. v. United States, 424 U.S. 800; 96 S.Ct. 1236; 47 L.Ed.2d 483 (1976) 15

TABLE OF AUTHORITIES (continued)

PAGE NO(S):

Commonwealth, Dept. of Environmental Resources v. Leechburg Mioning Co., 305 A.2d 764 (Pa.Cmwlth.1973, Bowman, P.J.) 14,25

Deets v. Mountain Top Area Joint Sanitary Authority, 479 A.2d 49 (Pa.Cmwlth.1984, Williams,J.) 14,25

Feigh v. Glendale School District, 545 A.2d 447 (Pa.Cmwlth.1988, McPhail, Jr.) 18,25

First Nat. Bank v. Ewing, 43 C.C.A. 150, 103 Fed.190 22

Foster v. Mutual Fire, Marine and Inland Insurance Co., 531 Pa. 598, 614 A.2nd 1086 (1992) ..... *passim*

page iii

Gold & Co., Inc. v. Northeast Theater Corp. 421 A.2d 1151 (Pa.Super.1979, Lipez, J.) 20,26

Jost v. Phoenixville Area School Dist., 547 A.2d 830 (Pa.Cmwlth.1988, Kalish, J.) 18,25

Judge v. Allentown and Sacred Heart Hospital, 506 Pa. 636, 487 A.2d 817 (1985) 1

Kapil v. Association of Pennsylvania State College and University Faculties, 504 Pa. 92, 99, 470 A.2d 482, 485 (1983) 32

TABLE OF AUTHORITIES (continued)

PAGE NO(S):

Kessler v. Old Guard Mut. Ins. Co., 570 A.2d 569 (Pa.Super.1990, Wieand, J.) 2,18,19,20,25

Knox v. Board of Probation & Parole, 588 A.2d 79 at 82 (Pa.Cmwlth.1991, Pellegrini, J.) 18,25

Krenzelak v. Krenzelak, 503 Pa. at 382-83, 469 A.2d at 991 32

Martin v. Department of Environmental Resources, 548 A.2d 672 (Pa.Cmwlth, 1988, Smith, J.).....14,25

Mathews v. Eldridge, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed2d 18 24

Matter of Howe, 913 F.2d 1141 (5th Cir.,1990) 17

Nilsen v. City of Moss Point, 701 F.2d 556 (5th Cir.,1983).....18

NOPSI v. New Orleans, 911 F.2d 993 (5th Cir.1990) 15

Ohio Association, etc. v. PERS, 585 N.E.2d 597 (Ohio Com.Pl.,1990) 31

Ohio Casualty Group v. Argonaut Insurance Company, 514 Pa. 430, 525 A.2d 1195 (1987) 1

Pawk v. Department of Environmental Resources, 395 A.2d 692 (Pa.Cmwlth.1978, Crumlish, J.) 14,25

TABLE OF AUTHORITIES (continued)

PAGE NO(S):

Pearson v. City of Grand Blanc, 961 F.2d 1211 (C.A. 6th Cir. 1992) 12

Richmond & I. Constr. Co. v. Richmond, N.I. & B.R. Co. 34 L..R.A. 625, 15 C.C. A. 289, 31 U.S. App. 704, 68 Fed. 116 22

page iv

Rucker v. Civil Service Commission, 491 A.2d 933 (Pa.Cmwlth. 1985, Craig, J.) 14,25

Sanders v. Loomis Armored, Inc., 614 A.2d 320 Pa.Super. 1992) 32

Smith v. Fenner, 399 Pa. 633, 641, 161 A.2d 150 (1960) 32

Township of McCandless v. McCarthy, 300 A.2d 815 (Pa.Cmwlth.1973, Mencer, J.) 18,25

Verner v. Shaffer, 500 A.2d 479 (Pa.Super.1985, Feeney, J.) 20,25,26,27

West Middlesex Area School District v. Pennsylvania Labor Relations Bd., 423 A.2d 781 (Pa.Cmwlth.1980, Rogers,J.) 14,25

Yick Wo v. Hopkins, 188 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) 28

TABLE OF AUTHORITIES (continued)

PAGE NO(S)

OTHER AUTHORITIES:

Article 1, §10 of the U.S. Constitution 3,26
Impairment of Contracts Clause

Article 4 §1 of the U.S. Constitution
Full Faith and Credit Clause of the
United States Constitution and
its implementing statute, 28 U.S.C. § 1728 3,10,29

Fourteenth Amendment to the United States Constitution, §1 30

Rule 1101 of the Pennsylvania Rules
of Appellate Procedure 1

Rule 2542(a) of the Pa. Rules of Appellate
Procedure 30

Section 723 of the Judicial Code
42 Pa. C.S. § 793 1

STATEMENT OF JURISDICTION

This is an appeal from a case commenced in the Commonwealth Court and decided by that court on November 10, 1993. Jurisdiction of the Supreme Court is based upon Section 723 of the Judicial Code, 42 Pa. C.S. § 723, which provides that the Supreme Court shall have jurisdiction over direct appeals from the Commonwealth Court in cases commenced in that Court, and Rule 1101 of the Pennsylvania Rules of Appellate Procedure, providing that an appeal may be taken as of right to the Supreme Court in any action commenced in the Commonwealth Court and not constituting an appeal to that Court. *Ohio Casualty Group v. Argonaut Insurance Company*, 514 Pa. 430, 525 A.2d 1195 (1987); *Judge v. Allentown and Sacred Heart Hospital*, 506 Pa. 636, 487 A.2d 817 (1985).

STATEMENT OF QUESTIONS INVOLVED

(a) Mutual's Election of Remedies. DID THE COMMONWEALTH COURT ERR IN FAILING TO FIND THAT MUTUAL FIRE WAS ESTOPPED FROM INVOKING THE BENEFITS OF THE PLAN OF REHABILITATION WHEN IT OPTED OUT OF THE CLAIM SETTLEMENT PROCEDURE OF THE PLAN AND INSTEAD ELECTED TO RESOLVE THE DISPUTE IN THE STATE COURTS OF LOUISIANA?

STATED DIFFERENTLY, DID THE COMMONWEALTH COURT FAIL TO APPLY THE DOCTRINES OF ***PRECLUSION*** and ***ELECTION OF REMEDIES***?

(b) FBT's Substantive Right to Interest. DID THE COMMONWEALTH COURT ERR IN FAILING TO HOLD THAT UNDER PENNSYLVANIA LAW A CLAIM FOR INTEREST IS PART OF THE SUBSTANTIVE CAUSE OF ACTION AND MERGED INTO THE JUDGMENT?

STATED DIFFERENTLY, DID THE COMMONWEALTH COURT ERR IN "SPLITTING" ISSUES AND DISREGARDING THE DOCTRINE OF ***MERGER*** BY NOT MERGING THE AWARD OF INTEREST INTO THE JUDGMENT? *Kessler v. Old Guard Mutual Ins. Co.*, 570 A.2d 569 (Pa.Super. 1990, Wieand, J.).

(c) Footnote 13. DID THE COMMONWEALTH COURT ERR IN HOLDING THAT MUTUAL FIRE WOULD *NEVER* BE OBLIGATED TO PAY INTEREST, NOTWITHSTANDING THE HOLDING IN *Foster v. Mutual Fire*, 614 A.2d 1086 (1992), PARTICULARLY FOOTNOTE 13 THEREOF WHICH HELD THAT:

"...interest accruing on claims after insolvency proceedings have begun *is payable only after the principal on all claims have been paid in full...*"?

(d) Due Process Violations. DID THE COMMONWEALTH COURT'S FAILURE TO APPLY THE DOCTRINES OF ***ELECTION OF REMEDIES, PRECLUSION*** AND/OR ***MERGER*** CONSTITUTE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION?

(e) Impairment of Contract Rights. DID THE COMMONWEALTH COURT ERR BY NOT APPLYING, OR BY IMPROPERLY APPLYING, THE IMPAIRMENT OF CONTRACTS CLAUSE OF THE UNITED STATES CONSITUTION, ARTICLE 1 §10?

(f) Unconstitutional as Applied. UNDER THE CIRCUMSTANCES OF THIS CASE, ASSUMING *ARGUENDO* THAT THE PLAN IS APPLICABLE TO FBT'S JUDGMENT, IS THE PLAN UNCONSTITUTIONAL "AS APPLIED"?

(g) Full Faith and Credit.[1] DID THE COMMONWEALTH COURT ERR IN NOT APPLYING, OR BY IMPROPERLY APPLYING, THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE 4 §1?

(h) Retroactive Application. BECAUSE THE "EFFECTIVE DATE" OF THE PLAN DID NOT OCCUR UNTIL THE SUPREME COURT DECISION IN *Foster v. Mutual* BECAME FINAL AND NON-APPEALABLE, WILL *ANY* IMPOSITION OF THE PLAN UPON FBT CONSTITUTE A "RETROACTIVE" APPLICATION OF SUBSTANTIVE LAW, IN VIOLATION OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION?

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[1] The penultimate location of this argument should not be taken as an indication of its importance. This could easily be the most compelling reason cited by FBT.

STATEMENT OF THE CASE

1. History of FBT's Litigation in the Louisiana State Court System. On August 19, 1986, FBT Bancshares, Inc. ("FBT") filed a petition for Damages in the 22nd Judicial District Court for the Parish of St. Tammany, State of Louisiana, against Mutual Fire, Marine and Inland Insurance Company ("Mutual") and other parties, seeking recovery under Policy No. CB 100067, issued by Mutual through its general underwriters, Shand Morahan[2]. On September 15, 1986, FBT amended its petition to increase the claim for damages to the sum of $1,730,297.61, together with legal interest from date of judicial demand until paid, as provided by Louisiana law[3]. On June 20, 1988, Mutual answered the petitions of FBT, but did not apply for a stay under The Plan[4]. On June 11, 1990, FBT filed a motion for summary judgment in the Louisiana courts, seeking a judgment against Mutual for policy limits, $1,000,000, together with legal interest as provided by law[5]. Judgment against Mutual was rendered on June 26, 1990, and the court's Reasons for Judgment indicated that Mutual did not raise any defense related to The Plan[6]. On August 9, 1990, FBT's James A. Comiskey met with Mutual claims director Ottheinz R. Larisch at

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[2] *Exhibit A.* Motion for Summary judgment ("M.S.J.")

[3] *Exhibit B.* M.S.J.

[4] *Exhibit D,* M.S.J.

[5] *Exhibit H,* M.S.J.

[6] *Exhibit J,* M.S.J.

the law offices of Lord, Bissell & Brook in Chicago, Illinois; Judge Comiskey (a retired Federal District Judge) was told that Mutual desired to proceed within the Louisiana State Court system as opposed to The Plan[7]. On August 27, 1990, Jeanne K. Jones, Senior Settlement Specialist for Mutual (and the Rehabilitator) confirmed that Mutual intended to prosecute an appeal in the Louisiana state court system[8]. On October 31, 1990, Director of Claims Charles D. Henderson advised that no consideration would be given to FBT until "...the underlying litigation has been resolved"[9]. On December 27, 1991, a three judge panel of the 1st Circuit Court of Appels affirmed the lower court Judgment. Mutual's application for rehearing, which did not invoke the plan, was denied March 13, 1992[10]. On April 13, 1992, Mutual applied for writs of certiorari or review to the Louisiana State Supreme Court without invoking the plan[11]. On September 4, 1992, the Louisiana State Supreme Court denied writs[12].

2.History of FBT's Actions in the Commonwealth Court. On July 3, 1990, after FBT's claim was reduced to judgments, FBT filed a Hardship Application. Essentially,

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[7] *Exhibit N,* M.S.J.

[8] *Exhibit O,* M.S.J.

[9] *Exhibit P,* M.S.J.

[10] *Exhibit S,* M.S.J.

[11] *Exhibit T,* M.S.J.

[12] *Exhibit U,* M.S.J.

FBT's bank, Fidelity,

was about to be closed by the FDIC because of the losses incurred but not paid by Mutual. This was avoided by merging with the Bank of Louisiana, which brought that bank under FDIC attack[13]. Thus, the hardship application was filed and Judge Comiskey travelled to Chicago to make a personal plea that the judgment be paid. Mutual, on three documented occasions, told FBT that its Hardship Application would be deferred until all appeals were over.

On August 9, 1990, at Judge Comiskey's meeting with Lord, Bissel & Brook, the following colloguy was transcribed, at page 24:

> "MR. ZOLLNER: *My personal preference would be to have the appellate decision run its course.* And I'm wondering whether there's any way that we could get the FDIC to hold off on its cease and desist order until that's resolved?
>
> MR. COMISKEY: We are certainly working on that very thing.
>
> MR. ZOLLNER: What I'm asking is: do you think Mutual Fire's joint request with Bank of Louisiana that they hold off *until we get this thing resolved at the appellate level* would have any more weight than just the Bank of Louisiana?"[14]

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[13] See Affidavits of James A. Comiskey and G. Harrison Scott, filed with the hardship application.

[14] *Exhibit N,* M.S.J.

On August 27, 1990, Jeanne K. Jones of Mutual confirmed that the application was not "ripe" and that Mutual intended to prosecute an appeal[15]. On October 31, 1990, FBT was again advised by the Director of Claims Charles D. Henderson that its hardship application would be held "...in abeyance *pending all appeals in the State of Louisiana...*" and that it would not be considered

page 7

until "...the underlying litigation *has been resolved*"[16].

No pleadings whatsoever were filed by Mutual until after the Louisiana Supreme Court denied writs on September 4, 1992. On October 2, 1992 when the value of the judgment exceeded $2 Million, Mutual issued a Notice of Determination setting the value of FBT's claim at $350,000[17]. On October 13, 1992, FBT's Objection to the Notice of Determination was filed with the Commonwealth Court of Pennsylvania[18], citing the Full Faith and Credit Clause of the United States Constitution, Election of Remedies and *res judicata* in opposition to FBT's arbitrary NOD.

On February 8, 1993, FBT filed a motion for summary judgment with 23 exhibits and 18 Pennsylvania cases in support. FBT's motion for summary judgment was granted in part and denied in part by the Commonwealth Court on November 10, 1993. In partially granting the

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[15] *Exhibit O,* M.S.J.

[16] *Exhibit P,* M.S.J

[17] *Exhibit V,* M.S.J.

[18] *Exhibit W,* M.S.J.

motion, the Commonwealth Court recognized the final judgment in the Louisiana Courts to the extent that it awarded FBT $1 Million. In partially denying the motion, however, the Commonwealth Court did not recognize FBT's entitlement to any interest whatsoever.

FBT has appealed that judgment insofar as it denies FBT judicial interest.

page 8

SUMMARY OF THE ARGUMENT

(a) Mutual's Election of Remedies. Mutual has waived the plan. Pursuant to the doctrine of ***Election of Remedies,*** Mutual elected to litigate this dispute in the Louisiana judicial system and is now bound by the final Louisiana judgment. Pursuant to the doctrine of ***Preclusion,*** Mutual is precluded from invoking Section XVII of the plan as a defense to FBT's entitlement to judicial interest.

(b) FBT's Substantive Right to Interest. The Louisiana judgment includes interest, which is a substantive right. Under the doctrine of ***Merger,*** interest (subject only to clerical computation) becomes "merged" into the judgment. Mutual did *not* request that the issue of interest be split during the litigation in the Louisiana courts. The Commonwealth Court erred in "splitting" issues where no such request was ever made.

(c) Footnote 13. Notwithstanding the arguments above, the Commonwealth Court misunderstood this Court's holding in connection with a judgment held by Pepsico. Footnote 13 of this Court's opinion in *Foster v.*

Mutual, 614 A.2d, at 1102 (1992) held that the plan was not unconstitutional, *per se*, because interest would be payable after the principal on all claims was paid. At worst, FBT is entitled to have its interest paid after the principal on all class 4 claims are paid. Additionally, in the Pepsico instance[19], Pepsico received recognition of interest which

accrued prior to December 4, 1986. FBT did not receive this recognition.

(d) Due Process Violations. The failure by a state court to apply state law fairly and impartially can, under certain circumstances, constitute a violation of the constitutional guaranty of due process. The commonwealth Court's failure to apply the doctrines of ***Election of Remedies, Preclusion,*** and ***Merger,*** under the circumstances of this case, constitutes a denial of due process.

(e) Impairment of Contract Rights. The Impairment of Contract Rights Clause of the United States Constitution prohibits state action which impairs the right of contract. FBT's contract of insurance with Mutual has been "impaired" to the tune of $1.2 Million in unrecognized interest. This Court's ruling in *Foster, supra,* was based on the rationale that the loss of interest would have an "insubstantial" impact on claimants. The rationale was also based on the premise that claimants would receive proportional payments. Neither of these two considerations exist as to FBT. The loss of interest now exceeds the principal

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[19] FBT does not believe that this Court's decision regarding Pepsico is "precedent", because in Pepsico, *Mutual immediately invoked the plan.* Mutual did not make an "election of remedies", and there was no waiver of the plan by Mutual. Thus, the Pepsico decision is inapposite.

balance due. That is *not* "insubstantial". Moreover, FBT, lured into litigation through three levels of Louisiana judiciary, has not yet received one penny. Accordingly, the Commonwealth Court's judgment results in an unconstitutional impairment of contract.

(f) Unconstitutional "As Applied". The application of the plan, if applied to FBT so as to deprive FBT of interest, would also be unconstitutional "as applied". This Court's original ruling in *Foster, supra,* considered creditors which have received

treatment far different than FBT. This Court should not allow Mutual to litigate to its heart's content and then attempt to start over under a dispute resolution procedure. To do so would sanction an unconstitutional application of an otherwise constitutional plan.

(g) Full Faith and Credit.[11] The Full Faith and Credit Clause of the United States Constitution requires that the State of Pennsylvania give *full* faith and credit to the final judgment of its sister state, Louisiana. Under Louisiana law, the judgment orders payment of legal interest "from date of judicial demand until paid". That substantive element of the Louisiana judgment must be given full faith and credit by the courts of Pennsylvania. Mutual did not, as it could have, attempt to defend against the adjudication of legal interest. That matter is now *res judicata,* and any decision severing that entitlement would be a violation of the Full Faith and Credit Clause of the United States Constitution.

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[20] The penultimate location of this argument should not be taken as an indication of its importance. This could easily be the most compelling reason cited by FBT.

(h) Retroactive Application. *Foster, supra*, was decided August 21, 1992. Considering the time for applying for rehearing and for filing a certiorari application to the United States Supreme Court, the judgment approving the plan did not become final and non-appealable until *December 4, 1992.* FBT was by then fully vested with its judgment. The plan did not become "effective", by its own provisions, until after FBT had obtained its judgment. Any deprivation of FBT's vested rights, which include its entitlement

page 11

to interest, would violate the Fourteenth Amendment to the United States Constitution and would constitute a prohibited "retroactive application" of substantive law.

page 12

ARGUMENT AND LAW

(a) Mutual's Election of Remedies

DID THE COMMONWEALTH COURT ERR IN FAILING TO FIND THAT MUTUAL FIRE WAS ESTOPPED FROM INVOKING THE BENEFITS OF THE PLAN OF REHABILITATION WHEN IT OPTED OUT OF THE CLAIM SETTLEMENT PROCEDURE OF THE PLAN AND INSTEAD ELECTED TO RESOLVE THE DISPUTE IN THE STATE COURTS OF LOUISIANA?

STATED DIFFERENTLY, DID THE COMMONWEALTH COURT FAIL TO APPLY THE DOCTRINES OF ***PRECLUSION*** AND ***ELECTION OF REMEDIES***?

As to FBT, Mutual has waived the plan. When it was expedient not to process FBT's claim administratively, Mutual ignored the plan, vigorously litigated with FBT, sought no stay, and made no efforts to place FBT's claim "in line" for payment. FBT has clearly not been treated in the same manner as other Class 4 claimants and has been prejudiced thereby. Only after having been defeated at three judicial levels did Mutual look to the plan for consolation, making the unconscionable "determination" that FBT's claim was worth $350,000[21]. As we set forth in our Motion for Summary Judgment to the Commonwealth Court, Mutual *abandoned* the plan long ago when it came to FBT and it is too late to now "selectively" look to the plan for assistance. FBT has a Judgment which includes interest. Because of Mutual's election of remedies, the plan is unavailable. Mutual is estopped from avoiding the consequences of its choice to litigate this matter to judgment.

page13

In the litigation below, Mutual clearly failed to invoke Section XVII of the plan regarding interest[22]. During the entire course of litigation in the Louisiana Courts,

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21 The decision to value our claim at $350,000 is unreasonable, arbitrary, and irrational. Where there is "...no rational basis for an administrative decision..." such action constitutes a denial of due process under the United States Constitution. *Pearson v. City of Grand Blanc*, 961 F.2d 1211, at 1221 (C.A. 6th Cir.1992).

22 Section XVII, entitled *Interest*, actually *does not deprive FBT of interest:*

> "Except as may be otherwise provided for in this Plan, *or as may be otherwise required under applicable law,* all Creditors holding Unsecured Claims shall waive interest..."

Here, interest *is* "...required under applicable law..." and FBT has *not* "waived interest".

Mutual had the opportunity to file a simple motion to stay, or a simple motion to limit the judgment to principal. The motion would have been no more than one or two pages long, with a certified copy of the plan annexed. Mutual took no such action. Mutual sought no such protection. Mutual invoked no provision of the plan, nor the plan itself. Under the doctrines of *Election of Remedies* and/or *Preclusion*, Mutual is unable to invoke the plan and it was error for the Commonwealth Court to afford Mutual any protection whatsoever.

The Doctrine of *Election of Remedies.* The law of Pennsylvania clearly holds that, when a party has two inconsistent paths to the same relief, the selection of one precludes resort to the other. One or the other must be chosen, and the loser cannot return for a "second bite" at the forum he initially excluded. Here, the "inconsistent paths" were (a) the administrative process provided by the plan and (b) the judicial, or legal remedies afforded by the Louisiana Courts. Mutual elected to choose the Louisiana Courts and cannot now return to the administrative process.

page 14

This is the doctrine of "Election of Remedies", and is not only deeply entrenched in Pennsylvania law, but has been uniformly and consistently applied by many members of the very Commonwealth Court whose judgment is on review herein. *Commonwealth, Dept. of Environmental Resources v. Leechburg Mining Co.,* 305 A.2d 764, (Pa.Cmwlth. 1973, Bowman, P.J.); *Pawk v. Department of Environmental Resources,* 395 A.2d 692, (Pa.Cmwlth. 1978, Crumlish, J.); *West Middlesex Area School District v. Pennsylvania Labor Relations Bd.,* 423 A.2d 781

(Pa.Cmwlth. 1980, Rogers, J.); *Deets v. Mountain Top Area Joint Sanitary Authority,* 479 A.2d 49 (Pa.Cmwlth. 1984, Williams, J.); *Rucker v. Civil Service Commission,* 491 A.2d 933 (Pa.Cmwlth. 1985, Craig, J.); *Martin v. Department of Environmental Resources,* 548 A.2d 672 (Pa.Cmwlth. 1988, Smith, J.) and *Altoona Vo-Tech Ed. Assoc. v. Altoona Vo-Tech School,* 559 A.2d 974 (Pa.Cmwlth. 1989, Palladino, J.).

Mutual's choice was intelligent and purposeful. A calculated risk. Mutual thought that it could prevail against FBT as to the entirety of FBT's claim, and thus pay nothing at all. That was a gamble which Mutual purposefully chose to take. As various pleadings clearly showed, Mutual had multitudinous opportunities to stop the litigation and proceed in the administrative forum provided by the plan. On June 20, 1988, Mutual answered the petitions of FBT Bancshares, *but did not apply* (page 15) *for a stay*[23] On February 27, 1989, FBT filed its Proof of Claim with the Rehabilitator in the principal amount of $1,730,297.61[24]. That Proof of Claim was assigned No. 10891 and received by the Rehabilitator on February 28, 1989. The claim is also docketed as Class 4 Claim No. BA 03317.[25]

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[23] *Exhibit D.* M.S.J.

[24] *FBT will never be made whole.* The Louisiana judgment cast Mutual for only 57.8% of FBT's loss. If FBT's judicial interest in taken away. FBT will recover less than 26.3% of the present value of its loss.

[25] *Exhibit E.* M.S.J.

At this juncture, there existed two "inconsistent" avenues for the resolution of the same claim. FBT pressed its lawsuit forward, prepared to oppose a motion for a stay[26], *but one was never filed.* On March 5, 1990, Mutual representatives working with the plan clearly became aware of the lawsuit against it, when in response to a request for information regarding litigation, FBT wrote to Mr. Ron K. Paul, at Mutual's offices, 1760 Market Street, Philadelphia, Pennsylvania[27]. On June 11, 1990, FBT's Motion for Summary Judgment[28], seeking policy limits of $1 Million, *together (page 16) with legal interest,* was argued. Again, Mutual did not invoke the Plan. On June 14, 1990, Mutual filed a Motion to Supplement its previous answer, and again, did not invoke the Plan[29].

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[26] There *are* defenses available to a party opposing such a motion. The grant of a stay requires that many factors be weighed. No one factor is necessarily determinative. *Colorado River Water Assn. v. United States,* 424 U.S. 800, at 818; 96 S.Ct. 1236, at 1247; 47 L.Ed.2d 483 (1976). A court faced with such a motion should "...not apply these factors as a mechanical checklist..." and should "...weigh the balance heavily in favor of exercising jurisdiction". *NOPSI v. New Orleans,* 911 F.2d 993, (5th Cir. 1990).

Moreover, The Plan was amended on February 26, 1990 to provide an exception to the stay: "...as permitted under the terms of this plan or by the Court*s*." Prior to the amendment, the singular "court" was used, referring to the Commonwealth Court. By adding the letter "s", we believe Judge Crumlish envisioned other courts dealing with motions to stay, *if Mutual chose to file such a motion in actions brought against it in other jurisdictions.*

[27] *Exhibit F,* M.S.J.

[28] *Exhibit H,* M.S.J.

[29] *Exhibit I,* M.S.J.

Judgment was originally rendered on June 28, 1990[30]. The Court's reasons for Judgment correctly indicate that Mutual did not raise any defense related to the plan of rehabilitation[31].

On October 28, 1991, argument was heard by the First Circuit Court of Appeals. Mutual made no request for a stay, although certain Louisiana jurisprudence would have supported a stay of proceedings at the appellate level where an out-of-state insurance carrier was in rehabilitation. *Anshutz v. J. Ray McDermott*, 642 F.2d 94 (5th Cir. 1981)[32]. On December 27, 1991, the Court of Appeals affirmed the lower court Judgment. Mutual applied for rehearing, but did not request a stay. The application for rehearing, which did not invoke any aspect of the plan, was denied March 13, 1992[33]. On April 13, 1992, Mutual applied for writs of certiorari or review to the Louisiana State Supreme Court. Again, Mutual's application did not request a stay or argue against (page 17) the award of interest.[34] On September 4, 1992, the Louisiana State

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30 In Reasons for Judgment dated November 10, 1993, the Commonwealth Court indicated that the judgment by the Louisiana District Court was not in the record, requiring the Court to confirm the judgment. The judgment is in the record, however, in connection with FBT's Hardship Application.

31 *Exhibit J*, M.S.J.

32 *Exhibit R*, M.S.J.

33 *Exhibit S*, M.S.J.

34 *Exhibit T*, M.S.J.

Supreme Court denied writs[35]. That ended the litigation. Mutual lost its gamble to "zero" FBT.

Mutual's Election of Remedies had run its full course.

The Doctrine of *Preclusion* and Legal Interest. Throughout the litigation, and at all three levels of the Louisiana court system, Mutual *failed* to raise *any* defense regarding FBT's entitlement to legal interest. It is fundamental that the doctrines of *res judicata* and *Preclusion* not only encompass those matters which were actually litigated, but also those matters which could have been, or should have been litigated. That is, all triable issues must be raised before the first court, and relitigation of any triable matter is precluded. FBT sought legal interest in its first petition[36] and in its first amended petition[37]. Mutual joined issue by denying FBT's paragraph 14, which requested legal interest on $1,730,297.61[38].

Mutual failed to invoke Section XVII of the plan regarding the issue of legal interest. The interest award, which is part of the Judgment rendered by the Louisiana Courts, is now *res judicata* under Louisiana *and* Pennsylvania Law. *Matter of Howe,* (page 18) 913 F.2d 1141, at 1144 (5th Cir.,1990); *Nilsen v. City of Moss Point,* 701 F.2d 556 (5th Cir.,1993) citing Restatement (2d) of Judgments

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[35] *Exhibit U,* M.S.J.

[36] *Exhibit A,* M.S.J.

[37] *Exhibit B,* M.S.J.

[38] *Exhibit D,* M.S.J.

§ 24; *Township of McCandless v. McCarthy,* 300 A.2d 815 (Pa.Cmwlth.,1973, Mencer, J.); *Feigh v. Glendale School District,* 545 A.2d 447 (Pa.Cmwlth., 1988, McPhail, J.); *Jost v. Phoenixville Area School Dist.,* 547 A.2d 830 (Pa.Cmwlth.,1988, Kalish, J.); *Knox v. Board of Probation & Parole,* 588 A.2d 79, at 82 (Pa.Cmwlth.,1991, Pellegrini, J.).

Mutual is precluded from now raising any defense as to FBT's entitlement of interest, *as a matter of law.* FBT has been prejudiced by Mutual's delay in payment and is entitled to receive the full award it fought hard to obtain through vigorous litigation.

(b) FBT's Substantive Right to Interest

DID THE COMMONWEALTH COURT ERR IN FAILING TO HOLD THAT UNDER PENNSYLVANIA LAW A CLAIM FOR INTEREST IS PART OF THE SUBSTANTIVE CAUSE OF ACTION AND MERGED INTO THE JUDGMENT?

STATED DIFFERENTLY, DID THE COMMONWEALTH COURT ERR IN "SPLITTING" ISSUES AND DISREGARDING THE DOCTRINE OF ***MERGER*** BY NOT MERGING THE AWARD OF INTEREST INTO THE JUDGMENT? *Kessler v. Old Guard Mutual Ins. Co.,* 570 A.2d 569 (Pa.Super. 1990, Wieand, J.).

The Doctrine of *Merger*. Under Pennsylvania law, a claim for interest is part of the "substantive cause of action" and an award of interest is "merged" into the

judgment. This is the doctrine of *Merger* and is no different from Louisiana law. It is fundamental that interest is substantive and "ancillary" to the (page 19) main demand. *Kessler v. Old Guard Mut. Ins. Co.*, 570 A.2d 569 (Pa.Super.1990), Wieand, J.). Adjudications regarding judicial interest, one way or another, become "merged" into a final judgment and are *res judicata* thereafter. *Kessler, supra*, is particularly dispositive. There, the plaintiff, although entitled to receive pre-judgment interest under Pennsylvania law, was not specifically awarded pre-judgment interest by the decree eventually entered by the Court. Lamenting that although the computation of the interest was a "simple clerical matter based upon dates and amounts appearing on the face of the record", the Court held that, because the judgment entered did not *specifically* contain an award of pre-judgment interest, the plaintiff could not recover same. The plaintiff's claims, including the claim for interest, said the Court, had become "merged in the judgment". So too, in the case of FBT, has the award of legal interest been "merged" into the final judgment rendered by the Louisiana courts.

Stated differently, the interest issue cannot be "split" from the remainder of the judgment, since it was not specifically reserved for another forum, but was rather clearly adjudicated. In order to "split" issues, the judgment must specifically so provide. *Coleman v. Coleman*, 522 A.2d 1115 (Pa.Super.,1987, Beck, J.). Had judicial interest *not* been included in FBT's judgment, as in *Kessler, supra*, FBT would have been barred from thereafter requesting it, even though both Pennsylvania and Louisiana substative law allowed it.

Indeed, the law of Pennsylvania recognizes that interest is substantively due on a contract claim, or a claim for money due, exactly as here. *Kessler, supra; Verner v. Shaffer,* 500 A.2d 479 (Pa.Super.,1985, Feeney, J.). As such, we were awarded judicial interest in Louisiana in the same way we would have been entitled to judicial interest had this matter been decided under Pennsylvania law. *Gold & Co., Inc. v. Northeast Theater Corp.,* 421 A.2d 1151 (Pa.Super.,1979, Lipez, J.).

FBT's right to receive interest was *vested* long before the plan became "effective"[39], and it was error to split the judgment.

(c) Footnote 13

DID THE COMMONWEALTH COURT ERR IN HOLDING THAT MUTUAL FIRE WOULD *NEVER* BE OBLIGATED TO PAY INTEREST, NOTWITHSTANDING THE HOLDING IN *Foster v. Mutual Fire,* 614 A.2d 1086 (1992), PARTICULARLY FOOTNOTE 13 THEREOF WHICH HELD THAT:

> "...interest accruing on claims after insolvency proceedings have begun *is payable only after the principal on all claims have been paid in full...*"?

Without prejudice to our argument that Mutual is not entitled to *any* benefits under the plan, and that Mutual is bound by the Judgment in its entirety, and for purposes of preserving our rights, we point out to this

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[39] By its own terms, the plan did not become "effective" until December 4, 1992. See point (h), *infra.*

Honorable Court that, alternatively, the payment of interest is, *at worst*, delayed until all class 4 claims are paid. (page21)

Although the Commonwealth Court determined that it was bound by the Supreme Court's decision regarding the Pepsi Cola judgment, it has disallowed FBT's judicial interest *altogether*! Footnote 13 of this Court's decision, however, indicates that the rationale for denying interest on claims was that "...interest accruing on claims after insolvency proceedings have begun *is payable only after the principal on all claims have been paid in full...*" Accordingly and at a minimum, the Commonwealth Court's judgment should be amended to require payment of interest at such time as the principal on all class 4 claims against Mutual shall have been paid in full.

We emphasize that interest is due on FBT's claim after payment of all class 4 claims because that is what the United States Supreme Court held in *American Iron & Steel Manufacturing v. Seaboard Airline Railway,* 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed 949 (1914), which was specifically relied upon by this Court in footnote 13. In that case, the Supreme Court held that in a receivership, where the assets of the insolvent are *in custodia legis,* the payment of interest would be delayed but never eliminated, stating, at 504:

> "...in case funds are not sufficient to pay *claims of equal dignity,* the distribution is made only on the basis of the principal of the debt. *But that rule did not prevent the running of interest during the receivership*; and if, as a result of good fortune or good managment, the estate proves sufficient to

> discharge the claims in full, *interest as well as principal should be paid.*"

This makes it clear that interest does accrue. The (page 22) question left is what are "claims of equal dignity". In that regard, the United States Supreme Court held that it is not necessary that claims of "lower rank" be paid in full in order for a higher ranking claim to receive the interest due. Specifically, at 505, after reiterating the rule that creditors are entitled to interest after bankruptcy adjudication, the Court dealt with differing ranks of claimants, thus:

> "The principle is not limited to cases of technical bankruptcy, where the assets ultimately prove sufficient to pay all debts in full, but principal as well as interest, accruing during a receivership, is paid on debts of the highest dignity, *even though what remains is not sufficient to pay claims of a lower rank in full. Central Trust Co. v. Condon*, 14 C.C.A. 314, 31 U.S. App. 387, 67 Fed. 84; *Richmond & I. Constr. Co. v. Richmond, N.I. & B.R. Co.* 34 L.R.A. 625, 15 C.C. A. 289, 31 U.S. App. 704, 68 Fed. 116; *First Nat. Bank v. Ewing*, 43 C.C. A. 150, 103 Fed. 190."

It is very clear that this rehabilitation has been well managed and that all class 4 claims will be paid in full. The most recent financial statement[40] filed by the rehabilitator shows that it has in excess of $183 Million

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[40] Financial statments are filed for each quarter. We refer to the financial statement filed for the fiscal year ending 12/31/93, available from the record. As further financial statements are filed, these numbers may change.

invested and *earning interest.*[41] For the fiscal year 1993, the rehabilitator paid out only $26 Million in proportional payments, although the plan requires that interim partial payments "...*shall* be made periodically on class 4 (page 23) adjusted claims *as cash is available...*"

In any event, classes 5 through 10 are scheduled for payment only after all class 4 claims are paid. Thus, classes 5 through 10 are of a "lower rank". It is not necessary to wait to see if the lower ranking classes receive full payment, and FBT's interest, at worst, will be due and payable when the principal on all class 4 claims is paid.

We emphasize that this relief is requested *arguendo.* For we do *not* concede that the plan has any application whatsoever, having been waived by Mutual. Nor that the Pepsico "precedent" applies to FBT, since the Pepsico matter did not involve an "Election of Remedies", and no purposeful decision was made by Mutual to litigate that case *in lieu of* administratively adjusting the claim. We make the above argument only in the alternative, should this Court not find in favor of FBT on points (a) and (b) above.

(d) Due Process Violations

DID THE COMMONWEALTH COURT'S FAILURE TO APPLY THE DOCTRINES OF

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[41] Because the "value of the money" (i.e., the interest earned by Mutual on FBT's $1 Million) now *exceeds* the principal amount due, Mutual has gained a "windfall" and will pay this claim *with FBT's own interest earned,* with $200,000 still left over! This is a gross denial of due process. Mutual has successfully played the "interest game" with FBT's money for eight years without any sincere or realistic chance of success.

ELECTION OF REMEDIES, PRECLUSION AND/OR ***MERGER*** CONSTITUTE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION?

In granting summary judgment only in part, the Commonwealth Court did not apply state or federal law consistently, but rather imposed an administrative penalty in lieu of substantive law. Failure by a state court to apply previous decisions consistently, under certain circumstances, can constitute a denial of due process and/or equal protections. Here, the Court opted to (page 24) enforce an administrative rule rather than the law of the land. The United States Supreme Court, in *Mathews v. Eldridge*, 96 S.Ct. 893, 424 U.S. 319, 47 L.Ed2d 18, has noted that due process "...is not a technical conception with a fixed content unrelated to time, place and circumstances..." and that due process "...calls for such procedural protection as the particular situation demands." *Id.* @ 902. Dealing with an administrative process, as here, the United States Supreme Court defined the scope of inquiry as follows:

> "Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected."

FBT's "private interest" is clear. FBT, which began in a hardship status, can hardly afford the loss of interest due. The original claim was for $1,730,997 for losses incurred in 1984 and 1985. FBT will *never* be made whole because the policy it purchased had a $1 Million limit. As it stands, FBT's judgment only casts Mutual for 57.8% of

its total losses. The Commonwealth Court's judgment, denying FBT interest, means that FBT will recover *less than 26.3% of the present value of its losses.* Thus, the "private interest" affected here is hardly "insubstantial."

Mutual's stake in this claim, on the other hand, is *de minimis.* Liquid assets approach $200 Million. "Settled Losses Remaining to Distribute" are but $54 Million. It appears that Mutual is near full rehabilitation, if not already rehabilitated. Thus, in comparing the "private interests" of FBT to the "governmental interests" of this rather well-heeled rehabilitation, (page 25) the denial of FBT's vested property rights is a denial of due process of law.

More specifically, the Commonwealth Court's failure to grant FBT's motion for summary judgment, in its entirety, is inconsistent with at least the following controlling Pennsylvania decisions[42]: *Cloonan v. Thornburgh,* 519 A.2d 1040 (Pa.Cmwlth. 1986), *Crumlish, J.); Commonwealth, Dept. of Environmental Resources v. Leechburg Mining Co.,* 305 A.2d 764 (Pa.Cmwlth.1973, Bowman, P.J.); *Pawk v. Department of Environmental Resources,* 395 A.2d 692 (Pa.Cmwlth. 1978, Crumlish, J.); *West Middlesex Area School District V. Pennsylvania Labor Relations Bd.,* 423 A.2d 781 (Pa.Cmwlth.1980, Rogers, J.); *Deets v. Mountain Top Area Joint Sanitary Authority,* 479 A.2d 49 (Pa.Cmwlth.1984, Williams, J.); *Rucker v. Civil Service Commission,* 491 A.2d 933 (Pa.Cmwlth. 1985, Craig, J.); *Martin v. Department of Environmental Resources,* 548 A.2d 672 (Pa.Cmwlth. 1988,

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[42] Rather than referring *supra,* we repeat complete citations for the convenience of the Court and the Court's staff.

Smith, J.); *Altoona Vo-Tech Ed. Assoc. v. Altoona Vo-Tech School*, 559 A.2d 974 (Pa.Cmwlth.1989, Palladino, J.); *Township of McCandless v. McCarthy*, 300 A.2d 815 (Pa.Cmwlth.1973, Mencer, J.); *Feigh v. Glendale School District*, 545 A.2d 447 (Pa.Cmwlth.1988, McPhail, Jr.); *Jost v. Phoenixville Area School Dist.*, 547 A.2d 830 (Pa.Cmwlth.1988, Kalish, J.); *Knox v. Board of Probation & Parole*, 588 A.2d 79, at 82 (Pa.Cmwlth.1991, Pellegrini, J.); *Keesler v. Old Guard Mut. Ins. Co.*, 570 A.2d 569 (Pa.Super.1990, Wieand, J.); *Coleman v. Coleman*, 522 A.2d 1115 (page 26) (Pa.Super.1987, Beck, J.); *Verner v. Schaffer*, 500 A.2d 479 (Pa.Super.1985, Feeney, J.); *Gold & Co., Inc. v. Northeast Theater Corp.*, 421 A.2d 1151 (Pa.Super.1979, Lipez, J.).

Under the totality of circumstances of this case, FBT has been deprived of a vested property right, in violation of The Due Process Clause of the United States Constitution.

(e) Impairment of Contract Rights

DID THE COMMONWEALTH COURT ERR BY NOT APPLYING, OR BY IMPROPERLY APPLYING, THE IMPAIRMENT OF CONTRACTS CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE 1 §10?

Article 1 of the United States Constitution, Section 10 provides that:

> "*No State shall* enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender of

> Payment of Debts; *pass any* Bill of Attainder, ex post facto Law, or *Law impairing the Obligation of Contracts,* or grant any Title of Nobility."

This is known as the Impairment of Contracts Clause of the United States Constitution, and was considered when this Court originally considered the plan. After careful review, this Court held that the plan was *not* unconstitutional on its face. In part, this court's decision was based on the rationale that any actual impairment caused by the plan would be "insubstantial" and for the good of all affected parties, at 1094:

> "Several objections to the plan assert that the Plan as proposed impermissibly impairs their various contractual rights. While this may in fact be an accurate assessment of the consequence of the proposed rehabilitation, (page 27) such impairment is not a *per se* violation of law and we agree with the Commonwealth Court that any actual impairments are *insubstantial*".

Additionally, this Court confirmed its rationale at footnote 4, which further analyzed the plan, stating, at 1095:

> "The Commonwealth Court properly upheld this portion of the Plan and concluded that in order to achieve the desired consequence of satisfying all claims in an equitable and orderly manner the resulting alleged contract impairments were *insubstantial.*"

There is little doubt that in selecting the judicial process in the instance of FBT's claim, the rehabilitator was exercising her fiduciary duty to protect her fisc. Indeed, the position taken by Mutual in the Louisiana courts was that there was no coverage whatsoever, and had Mutual prevailed, *FBT's claim would be reduced to zero.* That calculated risk had downside potential. Mutual now owes FBT the full judgment cast. Principal is $1 Million and judicial interest, as of the date of the filing of this brief, exceeds $1.1 Million. This is by no means "insubstantial".

Moreover, this Court's rationale in finding that the plan was not an unconstitutional impairment of contract rights was based, in part, on the fact that a typical claimant would receive seasonable payments. Under Pennsylvania law, interest is awarded as compensation for "...the use or detention of a plaintiff's property by the defendant...", *Verner v. Shaffer,* 500 S.2d 479 (Pa.Super.1985), citing *Barium Steel v. Wiley,* 379 Pa. 38, 108 A.2d 336 (1954). Here, Mutual is using the money which in part belongs to FBT *and is earning interest on that money*!

(page 28)

Moreover, because "The plan was to include...a provision for proportionate periodic payments of policyholder's claims", *Foster,* at 1090, the *denial* of interest would be theoretically justified by the periodic payments provided in the plan. *Mutual, however, has made no payments to FBT*[43]. Thus, FBT has received no *quid pro quo* which would justify, constitutionally, FBT being

---

[43] Most class 4 claimants have recieved 80 % of their claim. Mutual has failed to even tender 80 % of its own outrageous NOD of $350,000.

deprived of interest on money which has been judicially declared as due and payable since August 19, 1986.

Because the impact of the plan as to FBT is not "insubstantial" and because FBT has been deprived of a vested interest, The Impairment of Contracts clause prohibits the "splitting" of FBT's judgment so as to eliminate judicial interest.

(f) Unconstitutional "As Applied"

UNDER THE CIRCUMSTANCES OF THIS CASE, ASSUMING *ARGUENDO* THAT THE PLAN IS APPLICABLE TO FBT'S JUDGMENT, IS THE PLAN UNCONSTITUTIONAL "AS APPLIED"?

While the decision of the Commonwealth Court seemingly adopted this Court's determination that the plan is *not* unconstitutional on its face, to the extent that FBT is deprived of approximately $1.2 Million in interest, the consequences of the plan are *not* "insubstantial" and the plan, although constitutional on its face, becomes *unconstitutional*, "as applied". *Yick Wo v. Hopkins*, 188 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886) and its considerable progeny.

(page 29)

(g) Full Faith and Credit[44]

DID THE COMMONWEALTH COURT ERR IN NOT APPLYING, OR BY IMPROPERLY

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[44] The penultimate location of this argument should not be taken as an indication of its importance. This could easily be the most compelling reason cited by FBT.

APPLYING, THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION, ARTICLE 4 §1?

Article 4 of the United States Constitution deals with the reciprocal relationship between states and provides as follows:

"**Section 1. Full Faith and Credit**

"**Section 1.** Full Faith and Credit shall be given in each State to the public Acts, Records, and *Judicial Proceedings* of every other State..."

The Louisiana Supreme Court having denied writs, the Louisiana Judgment became final on September 4, 1992. Mutual did not have a right to ask for reconsideration of the denial of writs and Mutual did not apply to the United States Supreme Court for certiorari. Pursuant to Article 4 §1 of the United States Constitution, the courts of Pennsylvania are required to give the Louisiana Judgment *full* faith and credit. The judgment of the Louisiana Courts was conclusive and on the merits. Mutual actively litigated the merits of the case at the district level, at the appellate level, and at the Supreme Court level, never raising the plan or any of its provisions as a defense. Mutual's defenses regarding coverage were given full and fair consideration and the judgment rendered must be given deference and the full faith and credit it is constitutionally entitled to receive.

page 30

(h) Retroactive Application

BECAUSE THE "EFFECTIVE DATE" OF THE PLAN DID NOT OCCUR UNTIL THE SUPREME COURT DECISION IN *Foster v. Mutual* BECAME FINAL AND NON-APPEALABLE, WILL *ANY* IMPOSITION OF THE PLAN UPON FBT CONSTITUTE A "RETROACTIVE" APPLICATION OF SUBSTANTIVE LAW, IN VIOLATION OF THE 14TH AMENDMENT TO THE UNITED STATES CONSTITUTION?

Section 1 (12) of the plan defines the effective date of the plan:

> "The date on which this Plan *is approved by final Order,* which Order is not subject to a motion for reconsideration or an appeal and for which the time to seek reconsideration or file an appeal has expired."

The final order approving this plan did not occur until August 21, 1992, the date of this Court's decision in *Foster*. Pursuant to Rule 2542(a) of the Pa. Rules of Appellate Procedure, the parties to that proceeding had fourteen days to apply for reconsideration, or until September 4, 1992. Thereafter, the time period for applying to the United States Supreme Court for writs of certiorari was ninety days. Thus, the order approving the plan became final and non-appealable on December 4, 1992. Until then, the plan was not, by its own terms, "effective".

By December of 1992 the FBT judgment had long reached finality. The decision of the First Circuit Court of Appeals for the State of Louisiana, denying Mutual's re-

quest for reconsideration was handed down March 13, 1992. That was Mutual's last right of appeal. The denial of certiorari by the Supreme Court of Louisiana made the FBT judgment final as of March 13, 1992. FBT's judicial interest is a vested property right.

(page 31)

The imposition of an administrative plan, "effective" on a date substantially later than the date of FBT's vesting, would amount to a prohibited "retroactive" application of law. This concept is fundamental. In *Ohio Association, etc. v. PERS,* 585 N.E.2d 597 (Ohio Com.Pl.,1990) that court held, at 601:

> "*An administrative rule,* having the force and operation of a statute, *which extinguishes or impairs a vested legal relationship,* creates a new obligation, imposes a new duty or attaches a new disability to previous transactions constitutes a *retroactive enactment* and results in a deprivation of property without due process of law."

In connection with the unilateral devaluation of retirement benefits in the Pennsylvania school system, this Court has ruled that certain retroactive enactments are constitutionally void regardless of the fiscal or actuarial interests of the Commonwealth. In *Association of PA. State College v. State System,* 479 A.2d 962 (Pa. 1984) this Court stated, at 966:

> "Accepting the principle that the state's duty to maintain the fiscal integrity of the retirement fund through actuarial soundness is a valid basis for *some changes in a retirement system,* never-

> theless, the state's unilateral reduction of retirement benefits arising from the employment contracts cannot pass constitutional muster and must fall."

The same analysis is applicable here. The denial of interest under the plan had "acturial soundness" as one of its obvious goals. In view of the circumstances involved in *this* case, however, that goal cannot overcome the impairment of FBT's rights and does not pass "constitutional muster" as a retroactive enactment of administrative law.

(page 32)

Finally, in *Sanders v. Loomis Armored, Inc.,* 614 A.2d 320 (Pa. Super. 1992), the Pennsylvania Superior Court held, at 322:

> "Laws which are applied retroactively offend the due process clause if, 'balancing the interests of both parties, such application would be unreasonable.' *Id.* Retroactive laws which have been deemed reasonable are those which '***impair no contract and disturb no vested right,*** but only [vary] remedies, cure defects in proceedings otherwise fair, *and do not vary existing obligations* contrary to their situation when entered into and prosecuted.' *Krenzelak v. Krenzelak,* 503 Pa. at 382-83, 469 A.2d at 991 (quoting *Smith v. Fenner,* 399 Pa. 633, 641, 161 A.2d 150, 154 (1960)."

In the case at bar, imposition of Section XVII[45] of a

---

[45] We repeat, at the risk of being redundant, that the language of Section XVII does not actually deprive FBT of judicial interest, for the provision states "Except as may be otherwise provided for in this Plan, *or as many be otherwise required under applicable law,* all Creditors

plan which did not become "effective" until December 4, 1992 would be an unreasonable impairment of contract and a disturbance of FBT's vested right. In *Sanders, supra*, the Pennsylvania Superior court described a "vested" right as including an accrued cause of action, ruling, at 323 that:

> "The true test of when a cause of action arises or accrues is 'to establish the time when the Plaintiff could have first maintained the action to a successful conclusion.' *Kapil v. Association of Pennsylvania State College and University Faculties,* 504 pa. 92, 99, 470 A.2d 482, 485 (1983)."

Here, FBT's cause of action included, under Louisiana law, its *vested* right to recover judicial interest. That cause of action accrued and became a final judgment long before the plan was (page 33) approved. Accordingly, a denial of interest violates the 14th Amendment guaranty against the enactment of retroactive law.

---

footnote 45 continued

holding Unsecured Claims shall waive interest..."

The payment of interest *is* "required under applicable law".

CONCLUSION

Mutual has waived the plan. Mutual elected remedies. FBT's judgment is final and requires full faith and credit. FBT's right to interest is vested. The interest provision in the plan does not deprive FBT of interest. Any interpretation of the plan disallowing FBT interest would be an impairment of contract, a violation of due process and a retroactive enactment of substantive law. The judgment of the Commonwealth court should be amended to allow FBT to be paid in the full and true sum of $1 Million together with legal interest from date of judicial demand until paid, as set forth in the final judgment rendered in the Louisiana courts. Payment should be ordered from the cash assets available or alternatively, when all class 4 claims are paid.

Respectfully sumitted:

/s/ Henry L. Klein

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by hand delivery, FAX and/or by depositing same into the United States Mail, properly addressed and postage prepaid on this 14th day of April, 1994.

/s/ Illegible

APPENDIX E

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

CYNTHIA M. MALESKI, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA	:	No. 116 Middle District Appeal Docket 1993
v.	:	Appeal from the Order of the Commonwealth Court, No. 3483 C.D. 1986, dated November 10, 1993
THE MUTUAL FIRE MARINE & INLAND INSURANCE COMPANY	:	
APPEAL OF: FBT BANCSHARES	:	

ORDER

PER CURIAM DECIDED: DECEMBER 13, 1994

Order of the Commonwealth Court affirmed. Appellant's Motion for Transfer of Appeal to Philadelphia for Oral Argument is denied as moot.

Mr. Justice Montemuro is sitting by designation.

JUDGMENT ENTERED:
DECEMBER 13, 1994

/s/ John L. Stehulak

JOHN L. STEHULAK, ESQUIRE
DEPUTY PROTHONOTARY

APPENDIX F

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

GEORGE F. GRODE, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,	:	
	:	NO. 3483 C.D. 1986
Plaintiff	:	
vs.	:	
THE MUTUAL FIRE, MARINE & INLAND INSURANCE COMPANY,	:	
Defendant	:	

MOTION OF THE REHABILITATOR TO PAY CLASS 4 LOSS ADJUSTMENT EXPENSES IN FULL

Linda S. Kaiser, Insurance Commissioner and Rehabilitator of the Mutual Fire, Marine and Inland Insurance Company, by his attorney, hereby seeks permission of this Honorable Court to pay the loss adjustment expenses for outstanding class 4 claims in full as follows:

1. On February 26, 1990, this Honorable Court issued an Order approving and amending the Plan of Rehabilitation in the above-captioned matter. That Order stated, *inter alia*, at paragraph 11:

11(A). The second paragraph of Section IX Loss Adjustment Expenses is amended to read:

> Loss Adjustment Expenses related to the employment of all investigators, adjustors and counsel who are retained by the Rehabilitator or Mutual Fire or either their authorized agents to investigate, adjust and defend claims asserted against Mutual Fire's Policyholders ("Professionals") shall be shared equally by Mutual Fire and its Policyholders effective April 23, 1990. The Rehabilitator reserves the right to further reduce or terminate payment of Loss Adjustment Expenses in the event that cash flow is inadequate. Loss Adjustment Expenses will be paid as aforesaid by Mutual Fire only if Policyholders pay their share of Loss Adjustment Expenses and retain the services of Professionals previously approved or hereafter approved by the Rehabilitator.

Grode v. The Mutual Fire, Marine and Inland Insurance Company, 572 A.2d 798, 814 (Pa. Cmwlth 1990).

2. In approving the Plan, and thereafter modifying it by the February 26, 1990 Order to provide for loss adjustment expenses on Class 4 claims to be shared equally between Mutual Fire and its policyholders, this Court focused on the staggering cost of loss adjustment expenses and its effect upon the estate. This Court noted that "[w]e are painfully aware of the magnitude of this - the largest current expense of the estate - and the drain it causes on Mutual Fire's resources." 572 A.2d at 808-809.

3. Pursuant to the Plan, the Rehabilitator has paid and continues to pay its fifty percent (50%) share of the loss adjustment expenses incurred on behalf of policy-

holders.

4. In December, 1994, the Rehabilitator declared that sufficient collections had been made to pay all adjusted Class 4 claims in full and to adequately reserve for unadjusted Class 4 claims pursuant to Section VI of the Plan.

5. Moreover, in accordance with Section 11(D)(1)(a) and Section IX[1] of the Plan, the Rehabilitator has been adjusting reimbursement claims of policyholders seeking to recover the fifty percent of the loss adjustment expenses related to their claims that the policyholder paid pursuant to the Court's Order of February 26, 1990. The Rehabilitator expects to be able to pay such claims after the indemnity claims are paid.

6. The Rehabilitator has concluded that the payment of loss adjustment expenses on Class 4 claims no longer constitutes a significant drain on the assets of the estate, since the claims for such expenses have dwindled significantly and are limited to a small number of claims.

7. Adequate funds are available to pay such expenses in full as they are incurred.

8. The estate would incur additional unnecessary expense if the fifty percent limitation of the payment of loss

---

[1] Section IX of the Plan also provides: "Policyholders may include in their claims against Mutual Fire, for further review and consideration, all costs in defending insured claims, which costs would have been paid by Mutual Fire except for the suspension of certain Loss Adjustment Expenses herein."

adjustment expenses was continued in effect, because it requires duplicative effort to adjust the original loss adjustment expense claim, and then to adjust again the policyholder's claim for reimbursement of the fifty percent of such expenses paid. Moreover, approval of this Motion would reduce the continuing burden placed on policyholders to pay 50% of the loss adjustment expenses related to their claims.

9. Payment of these claims will in no way affect the payment of Class 4 indemnity claims, since the funds for such payments are already set aside in the Class 4 fund.

WHEREFORE, the Rehabilitator respectfully requests that this Honorable Court enter an Order in the form attached hereto amending the Court's order of February 26, 1990, to allow the Rehabilitator to pay in full professionals incurring loss adjustment expenses relating to Class 4 claims.

Respectfully submitted,

LINDA S. KAISER, Insurance Commissioner of the Commonwealth of Pennsylvania, and Rehabilitator of The Mutual Fire, Marine and Inland Insurance Company (In Rehabilitation)

By: /s/ James S. Gkonos

JAMES S. GKONOS, ESQUIRE
The Mutual Fire, Marine and Inland Insurance Company
(In Rehabilitation)
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1500 Market Street, 17th Floor
Philadelphia, PA 19102
(215) 567-9600

Dated: January 31, 1995

VERIFICATION

I, Alexander Bratic, Special Deputy Rehabilitator, hereby certify that the averments of fact contained in the foregoing Rehabilitator's Motion to Pay Class 4 Loss Adjustment Expenses in Full are true and correct to the best of my knowledge, information and belief. This verification is made subject to penalties of 18 Pa. C.S.A. §4904 relating to unsworn falsification to authorities.

/s/ Alexander Bratic

ALEXANDER BRATIC
SPECIAL DEPUTY REHABILITATOR

DATED: January 31, 1995

APPENDIX G

4/9/1
DIALOG(R)File 633:Phil Inquirer
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08032070
BANKRUPT 8 YEARS AGO, FIRM PAYS ALL CLAIMS. "THAT'S UNPRECEDENTED" SO SAYS THE ONE WHO HAS MANAGED MUTUAL FIRE MARINE & INLAND FOR THE STATE.
Philadelphia Inquirer (Pl) - WEDNESDAY February 1, 1995
By: Andrew Cassel, INQUIRER STAFF WRITER
Edition: FINAL Section: BUSINESS Page: C01
Word Count: 394

TEXT:

More than eight years after they took on one of the largest insurance bankruptcies in the nation, Pennsylvania insurance regulators have claimed a significant victory.

The Mutual Fire, Marine & Inland Insurance Co., a Philadelphia company that went belly up in 1986, has paid off all its policyholders in full, regulators said this week.

Alexander Bratic, who has managed the company on behalf of the state since 1990, said yesterday that Mutual Fire had paid out $235 million to between 4,000 and 5,000 policyholders, a critical step on the road to becoming a

functioning insurance company once again.

"That's unprecedented," Bratic said. "Without any outside help, we paid off all the claims" against the company.

Mutual Fire's customers were businesses, ranging in size "from the corner grocery to Exxon." Bratic said. The Company sold so-called "surplus lines" insurance, generally higher-risk policies that other companies would not sell.

But the company slid into insolvency in the 1980s, as its liabilities grew much larger than its assets. Mutual Fire was more than $400 million in the hole when the state took it over.

Rather than liquidate it or sell it to another insurer - the typical way such bankruptcies are handled - Pennsylvania insurance regulators decided to try to "rehabilitate" Mutual Fire. Bratic said that decision has paid off.

"Liquidation could have lasted 30 years in a company like this," he said. "The lesson is there is a faster way to resolve these insolvencies."

The company still has about 130 unsettled policyholder claims against it for about $90 million, Bratic said, but Mutual Fire has established a reserve to pay those off. Additionally, still to be settled are about 400 claims from other insurance companies for between $200 million and $250 million.

"I hope it won't take more than a year, or a year and

a half," to resolve those, Bratic said.

If the rest of the rehabilitation is successful, Mutual Fire could emerge as a functioning insurance company again, although a much smaller one than when it entered bankruptcy. Its assets would total $5 million or $6 million, as opposed to more than $400 million before 1986, Bratic said.

The company employs about 40 people in Center City, down from 250 before the bankruptcy. Bratic said the company would end up with a staff of about "20 or less" at the end of the rehabilitation.

APPENDIX H

IN THE COMMONWEALTH COURT
OF PENNSYLVANIA

GEORGE F. GRODE, INSURANCE COMMISSIONER OF THE COMMONWEALTH OF PENNSYLVANIA,	*	
Plaintiff	*	NO. 3483 C.D. 1986
VERSUS	*	
THE MUTUAL FIRE, MARINE & INLAND INSURANCE COMPANY,	*	
Defendant	*	

* * * * * * *

OBJECTION TO NOTICE OF DETERMINATION

AND NOW INTO COURT, through undersigned counsel, comes FBT Bancshares, Inc., claimant, and objects to the Notice of Determination served upon it by Mutual Fire, Marine and Inland Insurance Company on October 2, 1992, on the following grounds:

I.

This matter has been the subject of litigation, resulting in a final judgment in favor of FBT Bancshares, Inc. in the full and true sum of $1 Million, together with judicial interest from August 17, 1986 until paid.

II.

Pursuant to the Full Faith and Credit Clause of the United States Constitution, this Judgment must now be given full faith and credit by the Commonwealth Court, and is not subject to further "adjustment' by Mutual.

III.

Mutual is judicially, equitably and collaterally estopped from attempting to adjust this matter because it *elected* to litigate the issues in the Louisiana State Court system, and elected *not* to file a motion to stay proceedings, but rather chose to take its chances in the context of litigation.

IV.

Mutual's reasons for seeking Court approvaa of a lower payment than required under the judgment are idential to those reasons set forth in its defense of FBT's lawsuit in the Louisiana Courts, and the matter is now *res judicata*.

Respectfully submitted:

/s/ Henry L. Klein

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading has been served on all counsel of record by hand delivery, FAX and/or by depositing same into the United States Mail, properly addressed and postage prepaid on this 6th day of October 1992.

/s/ Henry L. Klein

Supreme Court, U.S.
FILED
APR 24 1995
OFFICE OF THE CLERK

No. 94-1577

In The

Supreme Court of the United States

October Term, 1994

FBT BANCSHARES, INC.,

Petitioner,

v.

THE MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY (IN REHABILITATION),

Respondent.

Petition For Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

(1) Where Petitioner chose not to participate in Pennsylvania court proceedings (held over five years ago) addressing the validity of the Mutual Fire Plan of Rehabilitation, and did not file a petition asking this Court to review the Pennsylvania Supreme Court's approval of the Plan, should the Petition for Writ of Certiorari, which seeks belatedly to challenge the validity of the Plan, be denied?

(2) Where the sole issue presented is whether, as applied to Petitioner (a judgment creditor of Mutual Fire), Section XVII of the Mutual Fire Plan of Rehabilitation is constitutionally infirm – an issue that was raised by other creditors more than five years ago, and addressed and decided by Pennsylvania's highest Court – and where Petitioner intentionally chose not to participate in those proceedings, should the Petition for Writ of Certiorari be denied?

(3) Where the Pennsylvania Supreme Court, in addressing the validity of the Plan's prohibition against payment of interest, has held that the Rehabilitator's equitable powers under Pennsylvania law and the state's significant interest in assuring equitable apportionment of unavoidable loss in the context of insurer rehabilitations clearly afford her the authority to limit *or deny* interest on judgments which were entered after the Petition for Rehabilitation had been filed, should the Rehabilitator's action, which denied interest on a post-rehabilitation judgment, be rescinded?

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED – Continued

(4) Where the Petitioner has no "contractual" rights to assert, should Petitioner's argument that the Mutual Fire Plan of Rehabilitation violates the Contract Clause be addressed?

TABLE OF CONTENTS

Page

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED i

TABLE OF AUTHORITIES v

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR REFUSAL OF THE WRIT 10

I. SECTION XVII OF THE PLAN, WHICH WAS EXPRESSLY APPROVED BY THE PENNSYLVANIA SUPREME COURT, PRECLUDES FBT FROM RECOVERING INTEREST ON ITS CLAIM 10

A. The Pennsylvania Supreme Court's Ruling in Connection with Pepsi-Cola's Appeal from the Plan Is Dispositive in This Case 10

B. FBT Has Waived Any Right It May Have Had to Challenge the Plan 12

II. FBT'S CONSTITUTIONAL CHALLENGES ARE MERITLESS 13

A. Section XVII Does Not Impair Any "Contractual Rights" of FBT 13

B. The Plan's Prohibition Against Interest Payments Does Not Violate Any Due Process Rights of FBT 15

C. The Rulings of the Commonwealth Court and the Pennsylvania Supreme Court Which Prevent FBT From Seeking Interest From the Insolvent Mutual Fire Estate Do Not Violate the Full Faith and Credit Clause 17

TABLE OF CONTENTS – Continued

Page

D. The Plan's Prohibition Against Interest Is Wholly Consistent With the General Rule That Interest on a Debtor's Obligation Ceases When Receivership Proceedings Commence 19

CONCLUSION 23

TABLE OF AUTHORITIES

Page

CASES:

American Iron & Steel Manufacturing Co. v. Seaboard Air Line Railway, 233 U.S. 261, 34 S. Ct. 502, 58 L.Ed. 949 (1914) 19, 20, 21

Energy Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 400, 103 S. Ct. 697, 74 L.Ed.2d 569 (1983) 14

Foster v. The Mutual Fire, Marine and Inland Insurance Company, 531 Pa. 598, 614 A.2d 1086 (1992), *cert. denied sub nom. Allstate Insurance Company v. Maleski*, 506 U.S. ___, 113 S. Ct. 1047, 122 L.Ed.2d 356 (1993) and *Republic Insurance Group v. Maleski*, 506 U.S. ___, 113 S. Ct. 1066, 122 L.Ed.2d 371 (1993) ..... *passim*

Grode v. The Mutual Fire, Marine and Inland Insurance Company, 132 Pa. Commw. 196, 572 A.2d 798 (1990) 3, 4

In re D.C. Sullivan, 929 F.2d 1 (1st Cir. 1991) 21

In re Sublett, 895 F.2d 1381 (11th Cir. 1990) 21

Mathews v. Eldridge, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976) 16

Morris v. Jones, 329 U.S. 545, 67 S. Ct. 451, 91 L.Ed. 488 (1947) 8, 11, 12, 17, 18, 19

John Nicholas, Trustee v. United States, 384 U.S. 678, 86 S. Ct. 1674, 16 L.Ed.2d 853 (1966) 20

Ticonic National Bank v. Sprague, 303 U.S. 406, 58 S. Ct. 612, 82 L.Ed. 926 (1938) 21

United States v. Ron Pair Enterprises, 489 U.S. 235, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989) 19

TABLE OF AUTHORITIES – Continued

Page

Vanston Bondholders Protective Comm. v. Green, 329 U.S. 156, 67 S. Ct. 237, 91 L.Ed. 162 (1946)... 19, 20, 21

Vickodil v. Commonwealth Insurance Dept., 126 Pa. Commw. 390, 559 A.2d 1010 (1989) 14

Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L.Ed. 220 (1886) 16

UNITED STATES CONSTITUTION:

Article 1, Section 10 (Contracts Clause) 13

Article 4, Section 1 (Full Faith and Credit Clause) 17

Fourteenth Amendment (Due Process Clause) 15

STATUTES/RULES:

Pennsylvania Insurance Department Act

40 P.S. § 221.1(c)..... 3

40 P.S. § 221.15..... 2

40 P.S. § 221.16..... 3

Pennsylvania Rule of Appellate Procedure 910 15

COUNTERSTATEMENT OF THE CASE

Respondent is Linda S. Kaiser, Insurance Commissioner of the Commonwealth of Pennsylvania, as Statutory Rehabilitator ("Rehabilitator") of The Mutual Fire, Marine and Inland Insurance Company ("Mutual Fire").[1] Petitioner FBT, a judgment creditor, has already received full payment of its 1990 judgment in the amount of $1 million from the insolvent Mutual Fire estate, and now seeks an additional $1.2 million in interest calculated from the date FBT commenced its lawsuit, August 19, 1986. The Plan of Rehabilitation under which Mutual Fire operates prohibits payment of interest.

The instant Petition raises the same arguments that were presented by other creditors in the Pennsylvania courts and in this Court by way of Petitions for Certiorari seeking review of the Pennsylvania Supreme Court's August 21, 1992 Order approving the Plan of Rehabilitation. *Foster v. The Mutual Fire, Marine and Inland Insurance Company*, 531 Pa. 598, 614 A.2d 1086 (1992), *cert. denied sub nom. Allstate Insurance v. Maleski*, 506 U.S. ___, 113 S. Ct. 1047, 122 L.Ed.2d 356 (1993) and *Republic Insurance Group v. Maleski*, 506 U.S. ___, 113 S. Ct. 1066, 122 L.Ed.2d 371 (1993). (Although it had full opportunity to do so, FBT did not participate in any of the Pennsylvania Court proceedings, nor did it file a petition in this Court.)

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[1] Mutual Fire has no parent company. Mutual Fire's subsidiaries, as defined by Sup. Ct. R. 29.1, are: Endmark Data Processing Corporation; Ryansure Intermediaries, Inc.; Cable Life Insurance Co.; UMI Asset Management; and UMI Holdings. Petitioner FBT Bancshares, Inc. ("FBT") incorrectly designates respondent as Mutual Fire, Marine and Inland Insurance Company, *Inc.*

The Pennsylvania Insurance Department commenced summary receivership proceedings against Mutual Fire on June 13, 1986, when it issued a "supervision order" severely restricting Mutual Fire's ability to conduct business. On September 12, 1986, the Insurance Commissioner of the Commonwealth of Pennsylvania issued an Order which, *inter alia*, prohibited Mutual Fire from conducting further business and stayed all actions and proceedings against Mutual Fire and its assets (the "Suspension Order"). On December 8, 1986, the Commonwealth Court of Pennsylvania, which is assigned jurisdiction over, and supervisory responsibility for, insurance rehabilitations and liquidations, entered an Order placing Mutual Fire into rehabilitation and appointing the Insurance Commissioner of the Commonwealth of Pennsylvania as Rehabilitator pursuant to the Pennsylvania Insurance Department Act (the "Act"), 40 P.S. § 221.15.

On August 19, 1986, FBT, Fidelity Bank & Trust Co. ("Fidelity Bank") and FBT's principal shareholders filed suit in Louisiana state court against Mutual Fire, Shand, Morahan & Co., Alexander & Alexander, and Charles B. Faler, a former president of Fidelity Bank and shareholder of FBT, alleging that Faler caused Fidelity Bank losses of $103,700 through admittedly unauthorized loans. (A-7.)[2] Mutual Fire had issued a director's and officer's liability policy in 1983 (with liability limits of $1,000,000) to Fidelity Bank and its officers and directors.

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[2] References to the Appendix in the Petition are designated as "A-___."

Petitioner FBT (a bank holding company and Fidelity's sole shareholder) was also named as an insured on the policy.

Significantly, on September 15, 1986, *after* entry of the Suspension Order by the Pennsylvania Insurance Department staying all actions and proceedings against Mutual Fire, FBT filed an "Amended Petition" in the Louisiana Court, identifying additional unauthorized loans made by Faler and claiming damages of $1,730,297.61, "together with legal interest thereon as provided by law." (A-7.)

1. FBT Failed to Appeal the Mutual Fire Plan of Rehabilitation, Which Prohibits Creditors from Seeking Interest.

The stated purpose of Article V of the Insurance Act, which governs the rehabilitation and liquidation of insolvent insurance companies in Pennsylvania, is "the protection of the interests of insureds, creditors, and the public generally" through, *inter alia*, "equitable apportionment of any unavoidable loss." 40 P.S. § 221.1(c). The Act affords the Insurance Commissioner, as statutory rehabilitator, broad discretion and authority to take whatever action is deemed necessary to correct the conditions which gave rise to the rehabilitation Order, including the authority to formulate a plan for rehabilitating the insolvent insurance company. 40 P.S. § 221.16(b), (d).

On January 31, 1989, the Rehabilitator submitted a Plan of Rehabilitation for Mutual Fire to the Commonwealth Court. *Grode v. The Mutual Fire, Marine and Inland Insurance Company*, 132 Pa. Commw. 196, 572 A.2d 798

(1990). The Plan dictates, *inter alia*, how and when creditors' claims are to be presented in the rehabilitation and the priority or class assigned to creditors' claims, including a procedure for the proportional payment (over a period of years) of Class 4 policyholder claims. In particular, Section XVII of the Plan, which Petitioner seeks to challenge in this Court, expressly prohibits payment of interest to creditors:

> Except as may be otherwise provided for in this Plan, or as may be otherwise required under applicable law, *all Creditors holding Unsecured Claims shall waive interest*, late charges, penalties, attorneys' fees and court costs against Mutual Fire and the Rehabilitator . . . . (Emphasis added.)

On March 7, 1989, copies of the proposed Plan, notice of its filing and of creditors' rights to file objections or responses thereto, and a Plan summary were served upon all creditors, policyholders and claimants, including Petitioner. Many creditors filed objections to the Plan with the Commonwealth Court. *FBT did not*. The Commonwealth Court conducted four days of hearings in July and August of 1989, *but FBT chose not to participate*.

By Opinion and Order dated January 23, 1990, the Commonwealth Court approved the Plan, with certain modifications. *Grode, supra*. Numerous creditors appealed that Order to the Pennsylvania Supreme Court. *FBT did not*. In fact, another judgment creditor, Pepsi-Cola Bottling Company of Charlotte, North Carolina appealed and specifically challenged Section XVII of the Plan, arguing that it was entitled to payment of interest on its

judgment.[3] *Foster*, 614 A.2d at 1101. FBT chose not to join or participate with Pepsi-Cola in that appeal.

By Opinion and Order dated August 21, 1992, a unanimous Pennsylvania Supreme Court approved the Rehabilitation Plan in all material respects. Significantly, in considering the Pepsi-Cola appeal, the Pennsylvania Supreme Court upheld Section XVII of the Plan as a proper exercise of the Rehabilitator's equitable powers, which clearly afford her the authority *"to limit or deny interest which accrues after a petition for rehabilitation or liquidation has been filed . . . ."* *Foster*, 614 A.2d at 1102 (emphasis added). The Court concluded that Pepsi-Cola's judgment entitled it to receive interest *only* through and until December 4, 1986, the date the Insurance Commissioner filed the Petition for Rehabilitation. *Id.*

2. FBT's Claim Against Mutual Fire in Louisiana State Court

The Rehabilitator defended the Louisiana state court suit against Mutual Fire on the basis that the policy's cross-insured exclusion, which precludes recovery under the policy by one insured for the conduct of another, precluded FBT (as an insured) from recovery on the policy as a result of the conduct of Faler (a co-insured). Both Mutual Fire and FBT eventually filed motions for summary judgment in the Louisiana action. In connection

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[3] Pepsi-Cola held a federal court judgment against Mutual Fire, entered in September of 1986 (prior to entry of the Rehabilitation Order), which included an award of interest at 8% per annum from the date of the contract breach, May 21, 1986. *Foster*, 614 A.2d at 1101-1102.

with its motion, FBT sought, for the first time, reformation of the six-year-old Mutual Fire policy *to exclude* FBT as an insured, alleging that its inclusion on the policy was in error.

On June 28, 1990, the Louisiana Court granted FBT's Motion, and in addition to reforming the policy to exclude FBT as an insured, found that FBT suffered losses in excess of the $1,000,000 policy limits and entered judgment against Mutual Fire for $1,000,000 "together with legal interest from date of judicial demand until paid." (A-2.) The amount of "legal interest" was never calculated by the Louisiana Court or entered on the record as part of the judgment.

Mutual Fire appealed the summary judgment order to the Louisiana Court of Appeal, which affirmed the decision of the trial court. Certiorari was eventually denied by the Louisiana Supreme Court on September 4, 1992.

3. FBT's Claim Against Mutual Fire in the Commonwealth Court Rehabilitation Proceedings

On February 28, 1989, while its action against Mutual Fire was still pending in Louisiana state court, FBT filed a Proof of Claim in the rehabilitation proceedings in the amount of $1,730,297.61.[4] As stated, FBT was subsequently served with a copy of the proposed Plan of

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[4] FBT never amended its claim in the rehabilitation although it reduced its claim from $1.7 to $1.3 million when it filed its Motion for Summary Judgment in the Louisiana state court.

Rehabilitation, but did not file any objections to the Plan or participate in the Plan hearings before the Commonwealth Court.

On October 2, 1992, pursuant to Section VII of the Plan, the Rehabilitator served FBT with a Notice of Determination ("NOD"), assessing the reasonable value of FBT's claim at $350,000. FBT then filed a Motion for Summary Judgment in the rehabilitation proceeding, arguing that FBT was *not* bound by Section XVII or any other provision of the Plan and that the rehabilitation court (the Commonwealth Court) was required to give effect to the Louisiana court's judgment awarding interest. FBT insisted that it was entitled to receive immediate payment not only of its $1 million judgment, but also interest from the date of the filing of its initial petition in Louisiana – August 19, 1986 – notwithstanding Section XVII of the Plan.

By Opinion and Order dated November 10, 1993, the Commonwealth Court granted FBT's Motion, in part, entering judgment in favor of FBT for the full amount of its judgment ($1 million); however, the Court denied FBT's claim for interest. With respect to the questions FBT now seeks to present for review by this Court, the Commonwealth Court made the following specific findings:

> (1) It was bound by the Pennsylvania Supreme Court's decision affirming the Plan,

and in particular, the provisions precluding payment of interest on creditor claims (A-11);

(2) The Pennsylvania Supreme Court allowed Pepsi-Cola interest on its *pre-rehabilitation* judgment, but only through December 4, 1986, the date rehabilitation was sought and the original Plan filed (A-11);

(3) Unlike Pepsi-Cola, FBT did not obtain its judgment until more than three years *after* the rehabilitation commenced (A-11);

(4) To allow FBT interest on its June 1990 judgment, when Pepsi-Cola was denied interest on a judgment which antedates the rehabilitation, would be in direct conflict with the holding of the Pennsylvania Supreme Court and "would be unreasonable, unsound and incongruous" (A-11);

(5) FBT was well aware of the rehabilitation, having filed a proof of claim in February of 1989, and could have appeared, as Pepsi-Cola did, to contest the Plan (A-11);

(6) FBT's failure to contest the Plan when it had the opportunity to do so over six years ago bars FBT from raising those issues now (A-11);

(7) Allowing FBT interest when it has been disallowed to other creditors would contravene *Morris v. Jones*, 329 U.S. 545 (1947), requiring parity among creditors (A-12).

FBT filed an appeal to the Pennsylvania Supreme Court claiming that it was entitled to immediate payment of its judgment plus an additional $1.2 million in interest

from the Mutual Fire estate.[5] On December 13, 1994, the Pennsylvania Supreme Court issued an Order affirming the Commonwealth Court's Order of November 10, 1993. In January 1995, FBT received payment from the Mutual Fire estate in the amount of $1 million.

FBT's assertions in its Petition concerning Mutual Fire's financial condition and its suggestions that the estate is solvent are self-serving and outrageous, and have no support in the record. According to Mutual Fire's publicly filed year-end 1994 financial statements, copies of which were furnished to FBT, Mutual Fire's current *deficit* is in excess of $400,000,000. Of the Company's $177 million in assets, approximately $150 million is encumbered or earmarked for specific reserve funds required to be established under the Plan, such as the fund for class 6 cedents (insurance companies which ceded business to Mutual Fire through reinsurance treaties) and a reserve of approximately $89 million for *unsettled* policyholder claims. Moreover, while all *settled and adjusted* policyholder claims have finally been paid in full, on a proportional basis, that does not represent *all* class 4 policyholder claims, as FBT suggests.

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[5] It should be noted that while the legal rate of interest in Louisiana may not exceed 12%, it appeared that FBT had calculated its interest claim on the $1 million judgment at a much higher rate (15%-16%), or alternatively, on the full amount of its initial demand, $1.7 million.

REASONS FOR REFUSAL OF THE WRIT

I. SECTION XVII OF THE PLAN, WHICH WAS EXPRESSLY APPROVED BY THE PENNSYLVANIA SUPREME COURT, PRECLUDES FBT FROM RECOVERING INTEREST ON ITS CLAIM

A. The Pennsylvania Supreme Court's Ruling in Connection with Pepsi-Cola's Appeal from the Plan Is Dispositive in This Case.

The sole issue raised by FBT in its Petition – that the insolvent Mutual Fire estate should be required to pay interest on this particular creditor's judgment – has already been decided, first by the Commonwealth Court of Pennsylvania following extensive hearings, and ultimately, by the Pennsylvania Supreme Court in its August 21, 1992 Opinion approving the Plan. Moreover, since FBT did not initially object to the constitutionality of the Plan, nor appeal the Order approving the Plan five years ago when it had the opportunity to do so, it should not be permitted to raise those issues now.

As stated, Section XVII of the Plan was the subject of the 1990 appeal of Pepsi-Cola Bottling Company of Charlotte, North Carolina in the Pennsylvania Supreme Court, one of ten creditor appeals taken from the Order of the Commonwealth Court approving the Plan. Upon review, the Pennsylvania Supreme Court acknowledged that while Pepsi-Cola's pre-rehabilitation judgment, including interest, must be given dignity "up until December 4, 1986" (the date of filing of the rehabilitation petition), the Rehabilitator's equitable powers afford her the authority "to limit or deny interest which accrues *after a petition for*

rehabilitation or liquidation has been filed . . . ." *Foster*, 614 A.2d at 1102 (emphasis in original.)

Confronted with FBT's claim in the rehabilitation proceeding that it was entitled to interest (at the rate of at least 12% from the date it *commenced* the Louisiana suit, August 19, 1986), the Commonwealth Court concluded that the Pennsylvania Supreme Court's prior ruling on Section XVII was binding. The Commonwealth Court noted that, unlike Pepsi, FBT did not obtain its judgment until more than three years *after* December 4, 1986. Therefore, any award of interest to FBT would "be in direct conflict" with the Supreme Court's holding in connection with the Pepsi-Cola appeal "and would be unreasonable, unsound and incongruous." (A-11.) The Commonwealth Court further noted that awarding interest on FBT's post-rehabilitation judgment, when interest had been disallowed on claims of other creditors, "would run afoul of the dictates" of *Morris v. Jones*, 329 U.S. 345, 91 L.Ed. 488 (1947), which requires parity between in-state creditors and those of other states. (A-12.)

Clearly, the Pennsylvania Supreme Court's 1992 ruling in connection with Pepsi-Cola's appeal from Section XVII of the Plan is dispositive of FBT's interest claim. That Court agreed that the Rehabilitator's equitable powers clearly afford her the authority to limit *or deny* interest which accrues *after* a petition for rehabilitation has been filed, which is precisely what Section XVII of the Plan accomplishes. *Foster*, 614 A.2d at 1102. To the extent that a judgment awarding interest is entered against Mutual Fire *prior* to the rehabilitation petition, it must be accepted and given dignity up until December 4, 1986. *Id.*

FBT simply does not fall within that category; its judgment was entered in June 1990.

B. FBT Has Waived Any Right It May Have Had to Challenge the Plan.

The time for any creditor, especially FBT in this case, to challenge the Plan's provisions has long passed, as the Commonwealth Court noted at page 6 of its Opinion. (A-11.) FBT filed a Proof of Claim in excess of $1.7 million with the Rehabilitator in February of 1989, and it received a copy of the proposed Plan of Rehabilitation and a Notice stating, *inter alia*, that "any party in interest may file an answer, objection or other responsive pleading to confirmation and approval of the Plan." Significantly, attached to this was a "Summary of Plan of Rehabilitation" which included the following statement: "[n]o creditor will be entitled to interest on any claim."

FBT knowingly and intentionally chose not to file objections to the Plan; FBT also chose not to participate in the extensive Plan hearings conducted by the Commonwealth Court in the summer of 1989. Furthermore, FBT did not, as did Pepsi-Cola and other creditors, exercise its right to appeal the January 23, 1990 Order approving the Plan. *FBT did nothing*, and its instant Petition is simply a belated attempt to attack a provision of the Plan that has already been challenged by other creditors, the validity of which was addressed and approved by Pennsylvania's highest court almost three years ago.

II. FBT'S CONSTITUTIONAL CHALLENGES ARE MERITLESS

A. Section XVII Does Not Impair Any "Contractual Rights" of FBT.

Petitioner devotes extensive time and effort in its Petition to a discussion of the Contracts Clause of the United States Constitution (Article 1, Section 10). This argument makes no sense, however, since FBT is a judgment creditor and has no "contractual" rights which could be impaired by the Plan. Once the Louisiana state courts reformed the Mutual Fire policy by deleting FBT's name as an insured, FBT no longer had any contract to enforce. Furthermore, FBT seeks payment of "judicial interest" under Louisiana law, rather than some form of "contractual interest." Since no provision for the payment of interest appears in the policy, no *contractual rights* of FBT (even if it were an insured) could have been impaired.

In any event, the constitutional challenges which FBT attempts to raise in its Petition, including the argument that the Plan is an improper impairment of contractual rights, were placed squarely before the Pennsylvania Supreme Court in 1990 by other creditors of Mutual Fire who, unlike FBT, could point to actual *contractual* impairments as a result of the Plan. The Pennsylvania Supreme Court, agreeing with the findings of the Commonwealth Court, concluded that "[a]ny actual impairments are insubstantial" in light of the Rehabilitator's statutory charge "to effectuate equitably the intention of the rehabilitation statutes, i.e., to minimize the harm to *all* affected parties." *Foster*, 614 A.2d at 1094 (emphasis in original). The Pennsylvania Supreme Court concluded:

> Furthermore, the exigencies attendant to a major commercial insolvency and the goals of rehabilitation necessitate the reality that "individual interests may need to be compromised in order to avoid greater harm to a broader spectrum of policyholders and the public." *Vickodil v. Commonwealth, Insurance Department*, 126 Pa. Commw. 390, 559 A.2d 1010, 1013 (1989). See also *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 103 S. Ct. 697, 74 L.Ed.2d 569 (1983).

Foster, 614 A.2d at 1094.

In addition, both the Commonwealth Court and the Pennsylvania Supreme Court found that, even if any alleged impairments could be viewed as substantial, the Plan of Rehabilitation satisfied the requirements outlined by this Court in *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*, 459 U.S. 400, 103 S. Ct. 697, 74 L.Ed.2d 569 (1983), *i.e.*, that the state set forth a legitimate and significant public purpose and that the contractual adjustment be reasonable. The significant interest on behalf of the state in this case is to regulate the fiscal affairs of its insurers "for the welfare of the public" by equitably apportioning unavoidable loss. *Foster*, 614 A.2d at 1094-1095, n.4. Accordingly, the Plan's restriction on interest represents a reasonable balancing of individual interests with the "broader spectrum of policyholders and the public". *Foster*, 614 A.2d at 1094, 1102.

B. The Plan's Prohibition Against Interest Payments Does Not Violate Any Due Process Rights of FBT.

FBT also contends that the imposition of any Plan provision upon FBT constitutes a "retroactive application of substantive law" in violation of the Fourteenth Amendment to the United States Constitution. FBT failed to raise this issue in the Commonwealth Court; nor was it properly raised in the Pennsylvania Supreme Court as FBT failed to identify this point in its Statement of Questions Presented filed with the Notice of Appeal to the Pennsylvania Supreme Court. See Pa. R.A.P. 910 (only questions set forth in the Jurisdictional Statement will be considered by the Pennsylvania Supreme Court.) Accordingly, FBT's arguments, raised for the first time in its Petition, should not be considered by this Court.

In any event, FBT's claim that the Plan constitutes a "retroactive application" of substantive law is wholly without merit. While FBT repeatedly argues that its claim for judicial interest was a "vested" property right prior to the Supreme Court's Order affirming the Plan,[6] the same observation can be made of virtually all creditors of Mutual Fire who are asserting claims. For this reason, notice of the Plan of Rehabilitation was submitted to all creditors, including FBT, and all creditors were given an

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[6] Contrary to FBT's claims, the Plan was approved by final Order and went into effect on January 23, 1990. Several creditors attempted to obtain a stay of the Plan; those requests were denied by both the Commonwealth Court and the Pennsylvania Supreme Court. Of course, FBT's judgment was not final until September 4, 1992.

opportunity to object and participate in hearings upon the Plan. FBT did not participate, although it had full opportunity to do so. Nor did FBT appeal the Commonwealth Court Order approving the Plan to the Supreme Court of Pennsylvania or to this Court.

Clearly, the Plan affects property rights, including "vested" rights, of creditors; however, all creditors were given the opportunity to challenge and litigate that Plan, and participate in a full and fair hearing in the Pennsylvania courts in satisfaction of due process and other constitutional requirements. *Mathews v. Eldridge*, 424 U.S. 319, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976) (due process requires, at a minimum, that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case). In fact, in *Mathews*, upon which Petitioner relies, this Court held that the administrative procedures established for termination of Social Security benefits "fully comport with due process" and that a *pre-deprivation* evidentiary hearing was *not* required. In the case of Mutual Fire, the Insurance Commissioner and Commonwealth Court provided exactly what the Social Security recipient in *Mathews* unsuccessfully sought – a full-blown objection and hearing procedure *before* the Plan could be approved.

Finally, FBT states, in perfunctory fashion, that the Plan is unconstitutional "as applied" because its interest claim is substantial, and that the Plan "ignores controlling Pennsylvania and Louisiana Law and thereby violates due process." (Petition, p. 17.) However, FBT fails to explain how this Plan amounts to "class legislation," which this Court condemned in *Yick Wo v. Hopkins*, 118 U.S. 356, 366-367, 30 L.Ed. 220 (1886). Indeed, no such

comparison can be made since the Plan prohibits interest to *all* creditors and, in doing so, serves one of the principal purposes of the rehabilitation statutes – equitable apportionment of unavoidable loss. Moreover, while the result (barring interest) may conflict with "controlling Pennsylvania and Louisiana law," the compelling state interest and overriding public purpose behind the rehabilitation of insolvent insurers necessitate that "individual interests may need to be compromised in order to avoid greater harm" to all creditors and the public. *Foster*, 614 A.2d at 1094. Contrary to FBT's arguments, due process compels the result achieved in this case.

C. The Rulings of the Commonwealth Court and the Pennsylvania Supreme Court Which Prevent FBT From Seeking Interest From the Insolvent Mutual Fire Estate Do Not Violate the Full Faith and Credit Clause.

FBT argues in its petition that the Pennsylvania courts refused to give full effect to the Louisiana judgment in violation of the Full Faith and Credit Clause of the United States Constitution (Article 4, Section 1) and the dictates of this Court in *Morris v. Jones*, 329 U.S. 545, 67 S. Ct. 451, 91 L.Ed. 488 (1947). However, this is simply another label for the same argument advanced by Petitioner – that it is exempt from the Plan of Rehabilitation.

FBT's claim is not unique or different from the claims asserted by Pepsi-Cola and hundreds of other judgment creditors of Mutual Fire. Were Mutual Fire not in rehabilitation, the judgments held by those creditors might very well be merged to include the interest award for

purposes of collection. However, Section XVII of the Plan establishes a different rule of law for creditors with judgments against Mutual Fire, an insolvent insurance company in rehabilitation. That rule of law prohibits payment of interest, not only to judgment creditors, but to the thousands of policyholders of Mutual Fire, many of whom have also had to wait over eight years to receive full payment on their claims. Section XVII of the Plan clearly serves a very significant purpose, as it enables the Rehabilitator to achieve one of the most important goals of rehabilitation – the equitable apportionment of any unavoidable loss. *Foster*, 614 A.2d at 1091.

In *Morris v. Jones, supra*, this Court found that an Illinois liquidation court was required to give full faith and credit to the *amount* of a judgment obtained by a creditor in Missouri against the insolvent Illinois carrier. Significantly, this Court noted that the creditor's submission of his proof of claim in judgment form did not raise any question of "priority of claims against the property of the debtor." *Morris*, 91 L.Ed. at 494. Accordingly, "no question of parity of treatment of creditors, or the lack thereof is in issue." *Id.*

Unlike the creditor in *Morris*, FBT, in insisting that the part of its judgment which awards "legal interest" be given full faith and credit in the rehabilitation court, is raising a challenge to the priority of claims established in the Plan of Rehabilitation. As stated, FBT is arguing that it should receive preferential treatment by having its interest claim recognized in contravention of Section XVII of the Plan and ahead of the substantial claims of creditors in classes 5, 6, 7, 8 – claims on which *no principal* sums have been paid. Clearly, FBT's arguments deal

directly with matters of "distribution" and "determination of what priority" claims should have against the insolvent insurer, matters which this Court held are *not* subject to full faith and credit treatment. *Morris*, 91 L.Ed. at 494.[7]

D. The Plan's Prohibition Against Interest Is Wholly Consistent With the General Rule That Interest on a Debtor's Obligation Ceases When Receivership Proceedings Commence.

It is well established that interest on a debtor's obligations ceases to accrue when receivership proceedings commence. *Vanston Bondholders Protective Comm. v. Green*, 329 U.S. 156, 67 S. Ct. 237, 91 L.Ed. 162 (1946); *American Iron & Steel Manufacturing Co. v. Seaboard Air Line Railway*, 233 U.S. 261, 34 S. Ct. 502, 58 L.Ed. 949 (1914). Various exceptions to this general rule have been recognized (and codified under the Bankruptcy Code), such as payment of interest on over-secured claims and under circumstances in which the debtor becomes solvent. *United States v. Ron Pair Enterprises*, 489 U.S. 235, 109 S. Ct. 1026, 103 L.Ed.2d 290 (1989). The latter, the "solvency exception," provides that in the rare case in which an estate proves ample "to pay *all creditors* and to pay interest," equitable considerations may be invoked to permit the payment of interest.

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[7] FBT insists, as it did in the Commonwealth Court, that its $1 million judgment and interest claim are "merged" and cannot be "split" into separate issues by virtue of the Plan or decisions of the Pennsylvania courts. Yet, while its appeal was pending before the Pennsylvania Supreme Court, FBT took just the opposite position in the Commonwealth Court, arguing that Mutual Fire should be required to pay the $1 million judgment while FBT pursued the "separate" interest issue on appeal.

Vanston, 329 U.S. at 164. *See also, John Nicholas, Trustee v. United States*, 384 U.S. 678, 86 S. Ct. 1674, 16 L.Ed.2d 853 (1966).

In *American Iron & Steel*, a case relied on by Petitioner, this Court explained at length the rationale behind the general rule that interest ceases to accrue when receivership proceedings commence:

> . . . [it] is a necessary and enforced rule of distribution, due to the fact that in case of receiverships the assets are generally insufficient to pay debts in full. If all claims were of equal dignity and all bore the same rate of interest, from the date of the receivership to the date of final distribution, it would be immaterial whether the dividend was calculated on the basis of the principal alone or of principal and interest combined. *But some of the debts might carry a high rate and some a low rate, and hence inequality would result in the payment of interest* which accrued during the delay incident to collecting and distributing the funds.

American Iron & Steel, 233 U.S. at 266 (emphasis added).

In *American Iron & Steel*, the debtor had achieved solvency and the dispute related to the order in which the trustees had paid interest to certain creditors. *That is certainly not the case with Mutual Fire*, as its current liabilities exceed its assets by over $400,000,000. While the Rehabilitator has achieved significant success to date and has been able to pay, on a proportional basis, all settled and adjusted policyholder claims, there remain hundreds of unsettled (and unpaid) policyholder claims against the estate. In addition, the claims of class 6 ceding companies for out-of-pocket payments alone exceed $200,000,000.

Clearly, Petitioner's request that it be paid over $1,000,000 in interest, in addition to the $1,000,000 policy payment that it has already received, completely ignores the concept of balancing of the equities. *Vanston*, 329 U.S. at 165. Mutual Fire's assets are insufficient to pay the full principal amount on the thousands of remaining claims being asserted against the estate. In order to pay interest which has accrued during the pendency of the rehabilitation to Petitioner and thousands of previously-paid class 4 claimants, the Rehabilitator would have to seek the return of principal payments already made to policyholders, which would create an entirely unworkable and inequitable situation. The principles established by this Court in *Vanston* and *American Iron & Steel* were designed to prevent just that, *i.e.*, a situation in which creditors asserting claims with different rates of interest could exhaust the limited funds of an estate.

Each of the cases cited by FBT in its Petition involves either debtors that became solvent and were able to pay *all* claims, or creditors with claims that were over-secured. *See, for example, Ticonic Nat'l Bank v. Sprague*, 303 U.S. 406, 82 L.Ed 926 (1938) (exception noted for over-secured creditor who was entitled to interest); *In re Sublett*, 895 F.2d 1381 (11th Cir. 1990) (exception made for creditor whose claim was over-secured); *In re D.C. Sullivan*, 929 F.2d 1 (1st Cir. 1991) (presented "rare case," since debtor became solvent during the course of the proceedings).

FBT further argues that the Pennsylvania Supreme Court, in approving the Plan, created an additional creditor class at footnote 13 of its Opinion (a class of creditors with interest claims) at the same time that it approved

Section XVII's *prohibition* of interest payments. According to FBT, it was entitled, by virtue of that footnote, to receive payment of its interest after payment of the principal on class 4 claims, but *before* any principal is paid on classes 5 through 10. (Petition, pp. 8-10.) In effect, FBT is suggesting that this Court should review this matter because the Pennsylvania Supreme Court, in FBT's view, has issued conflicting opinions.

FBT's arguments simply do not belong in this Court and are a strained effort to create federal questions where none exist. In any event, its assertions cannot be reconciled with any fair or reasonable reading of *Foster*. That Court did not create or sanction such preferential treatment for FBT or any other creditor. Rather, its holding with respect to Pepsi's challenge to Section XVII was clear and straightforward – while interest expressly awarded in connection with pre-rehabilitation judgments (as was the case with Pepsi's federal court judgment) "must be accepted and given dignity up until December 4, 1986," interest which accrues after that date is properly denied under Section XVII. *Foster*, 614 A.2d at 1102.

In footnote 13 of its Opinion, the Court in *Foster* observed only that this *result* – "disallowing the payment of interest on Pepsi's judgment *for any period beyond the date the petition of rehabilitation* was filed" – is consistent with decisions in this and other courts which (even where no plan or formal prohibition of interest existed) held that interest accruing after commencement of insolvency proceedings could be payable, if at all, only after the principal on *all* claims has been paid in full. *Foster*, 614 A.2d at 1102, n.13.

The effect of granting the relief which FBT requests would be to create an intermediate class between class 4 and class 5, a class of which FBT would be the only member. There is certainly no basis under the Pennsylvania Insurance Department Act, the Plan or the United States Constitution for singling out FBT as a creditor deserving of preferential status when it comes to the distribution of Mutual Fire's limited assets. Indeed, FBT is demanding that the Rehabilitator and this Court ignore her statutory charge to "equitably apportion" any unavoidable loss and to protect the interests of *all* creditors, policyholders and the public.

CONCLUSION

For the foregoing reasons, it is submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

NO. 94-1577

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In the Supreme Court of the United States

OCTOBER TERM, 1994

FBT BANCSHARES, INC.
PETITIONER

versus

MUTUAL FIRE, MARINE AND INLAND INSURANCE COMPANY, INC.,
(IN REHABILITATION)
RESPONDENT

CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA FROM THE ORDER DATED DECEMBER 13, 1994

REPLY TO OPPOSITION

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SUMMARY OF REPLY

(1) THIS COURT'S DECISIONS IN *MORRIS V. JONES*, 329 U.S. 545, 67 S.CT. 451, 91 L.ED.488 (1947) AND *AMERICAN IRON & STEEL MANUFACTURING V. SEABOARD AIR LINE RAILWAY*, 233 U.S. 261, 34 S.CT. 502, 58 L.ED 949 (1914) ARE CONTROLLING AND WARRANT THE GRANTING OF CERTIORARI.

(2) THE REHABILITATOR CANNOT OVERRIDE THE UNITED STATES CONSTITUTION; MOREOVER, MUTUAL'S OPPOSITION ACTUALLY ***CONFIRMS THE APPLICABILITY OF THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION.***

(3) THE 1992 RULING OF THE PENNSYLVANIA SUPREME COURT REGARDING PEPSICO IS ***NOT RES JUDICATA*** AS TO FBT.

(4) IT WAS MUTUAL WHICH WAIVED THE PLAN BY ***NEVER INCLUDING FBT*** IN THE PLAN; MOREOVER, MUTUAL IS ESTOPPED FROM INVOKING A PLAN WHICH IT ***NEVER PLEADED AS A DEFENSE IN THE LOUISIANA LITIGATION.***

(5) THE OPPOSITION DOES NOT CONTEST THE ANNOUNCEMENT THAT MUTUAL WILL SOON "***...EMERGE AS A FUNTIONING INSURANCE COMPANY...***" AND THE SOLVENCY EXCEPTION APPLIES HERE.

TABLE OF CONTENTS

PAGE:

SUMMARY OF REPLY i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

ARGUMENT AND LAW 1

(1) This Court's decisions in *Morris v. Jones,* 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed.488 (1947) and *American Iron & Steel Manufacturing v. Seaboard Air Line Railway,* 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 949 (1914) are controlling and warrant the granting of certiorari 1

(2) The Rehabilitator cannot override the United States Constitution; Moreover, Mutual's opposition actually ***Confirms the applicability of the Full Faith and Credit Clause of the United States Constitution*** 4

(3) The 1992 ruling of the Pennsylvania Supreme Court regarding Pepsico is ***not res judicata*** as to FBT 5

(4) It was Mutual which waived the plan by ***never including FBT*** in the plan; Moreover, Mutual is estopped from invoking a plan which it ***never pleaded as a defense in the Louisiana litigation*** 6

TABLE OF CONTENTS (continued)

PAGE:

(5) The Opposition does not contest the announcement that Mutual will soon "...***Emerge as a Functioning Insurance Company...***" and the solvency exception applies 7

CONCLUSION 8

AFFIDAVIT OF SERVICE 9

TABLE OF AUTHORITIES

CASES **PAGE:**

American Iron & Steel Manufacturing Co. v. Seaboard Air Line Railway, 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 949 (1914) 1,2,3

Morris v. Jones, 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed. 488 (1947) 1,2,3

ARGUMENT AND LAW

(1) THIS COURT'S DECISIONS IN *MORRIS V. JONES*, 329 U.S. 545, 67 S.CT. 451, 91 L.ED.488 (1947) AND *AMERICAN IRON & STEEL MANUFACTURING V. SEABOARD AIR LINE RAILWAY*, 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed 949 (1914) ARE CONTROLLING AND WARRANT THE GRANTING OF CERTIORARI.

This is a case in which a state court has decided constitutional questions "...in a way that conflicts with applicable decisions of [the Supreme] Court. Supreme Court Rule 10.1(c). ***The Insurance Commissioner for the State of Pennsylvania cannot override the jurisprudence of this Honorable Court.***

The legal issues in this case have long been settled in the cases of *Morris v. Jones,* 329 U.S. 545, 67 S.Ct. 451, 91 L.Ed.488 (1947), and *American Iron & Steel Manufacturing v. Seaboard Air Line Railway,* 233 U.S. 261, 34 S.Ct. 502, 58 L.Ed. 949 (1914). In the instant case, FBT obtained a final judgment in Louisiana for principal and interest against Mutual, and sought to have the judgment recognized in Pennsylvania, where Mutual was in rehabilitation. In *Morris, supra,* the facts were the same except: (a) that insurance company was in liquidation as opposed to rehabilitation and (b) that insurance company did not contest the suit in Missouri, whereas Mutual chose to vigorously contest the suit in Louisiana. In her opposition, the Pennsylvania Insurance Commisssioner does **not** suggest that *Morris, supra,* is inapplicable, but rather misstates the holding of this Court.

Here, the Pennsylvania Supreme Court, ***without giving reasons,*** simply refused to give FBT's Louisiana Judg-

ment ***full*** faith and credit. In her opposition to FBT's petition for writ of certiorari, Mutual's rehabilitator argues that FBT is attempting to create a separate set of priorities. ***That is absolutely not correct.*** FBT is simply requesting compliance with the United States Constitution. In *Morris, supra*, this Court dealt with Mutual's specious argument, at 455:

> "The establishment of the existence ***and amount*** of a claim against the debtor in no way disturbs the possession of the liquidation court, in no way affects title to the property, and does not necessarily involve a determination of what priority the claim should have."

Accordingly, the total amount of FBT's Judgment should have been recognized. The Rehabilitator willingly submitted to the jurisdiction of the Louisiana Courts. It is axiomatic that the rehabilitator ***is conclusively bound by all aspects of the Louisiana Judgment.*** In *Morris, supra*, this Court so held at 455:

> " 'A judgment of a court having jurisdiction of the parties and of the subject matter operates as *res judicata*, in the absence of fraud or collusion, even if obtained upon a default.' (citations omitted) Such a judgment obtained in a sister state is...entitled to full faith and credit in another State, ***though the underlying claim would not be enforced in the State of the forum.***"

The Commonwealth Court of Pennsylvania refused to enforce FBT's underlying claim for judicial interest, citing Pennsylvania law (i.e., the Pennsylvania Supreme Court's handling of Pepsico's claim). But because Mutual did not raise that issue in any of the Louisiana courts, Mutual did **NOT** have the right to relitigate what "...had

ripened into a (final) judgment..." This, too, was the holding of this Court in *Morris, supra*, at 456:

> "[The Missouri] judgment was a final determination of the nature and amount of [the plaintiff's] claim...That determination [the Missouri judgment] is final and conclusive in all courts. ***'Because there is a full faith and credit clause a defendant may not a second time challenge the validity of the plaintiff's right which has ripened into a judgment.'*** "

Although in *Morris* this Court did not have the issue of priorities in distribution before it (at 457), this Court's decision in *American Iron and Steel, supra*, is dispositive on that issue. In her opposition, the Pennsylvania Insurance Commissioner misstates this Court's holding by suggesting that the obligation to pay interest ceases when receivership proceedings commence. (Opposition, at p.19.) That was **NOT** the holding of this Court, which recognized, at 504, that:

> "...***in case funds are not sufficient to pay claims of equal dignity,*** the distribution is made only on the basis of the principal of the debt. ***But that rule did not prevent the running of interest during the receivership;*** and if, as a result of good fortune or good management, the estate proved sufficient to discharge the claims in full, interest as well as principal should be paid."

Notwithstanding the arguments made by the Pennsylvania Insurance Commissioner in her opposition, the *sub silentio* judgment of the Pennsylvania Supreme Court violates the jurisprudence of this Court and this case qualifies for certiorari pursuant to the guidelines set forth in Rule 10.1(c) of the Rules of the Supreme Court of the United States, which has always been the ultimate guard-

ian of the Full Faith and Credit Clause of the United States Constitution.

> (2) THE REHABILITATOR CANNOT OVERRIDE THE UNITED STATES CONSTITUTION; MOREOVER, MUTUAL'S OPPOSITION ACTUALLY ***CONFIRMS THE APPLICABILITY OF THE FULL FAITH AND CREDIT CLAUSE OF THE UNITED STATES CONSTITUTION.***

In her opposition, the Pennsylvania Insurance Commissioner argues that she had "discretion" to essentially split the Louisiana Judgment into two separate parts. Not only did Mutual fail to make such an argument in the Louisiana courts, but the very section of the plan upon which the rehabilitator relies ***confirms*** the applicability of the Full Faith and Credit Clause.

The allegedly applicable provision of the Plan of Rehabilitation is quoted at page 4 of the opposition brief, but with the *wrong* emphasis supplied. The following emphasis is correct and provides for the full recognition of FBT's Louisiana Judgment:

> "Except as may be otherwise provided for in this Plan, ***or as may be otherwise required under applicable law,*** all Creditors holding Unsecured Claims shall waive interest, late charges, penalties, attorney's fees and court costs against Mutual Fire and the Rehabilitator..."

The "...applicable law..." happens to be the United States Constitution. Pursuant to the Full Faith and Credit Clause, Pennsylvania is bound conclusively and completely

by the final judgment of its sister state, Louisiana. The rehabilitator cannot override the rights, privileges and immunities guaranteed to FBT by the United States Constitution. The proper time for Mutual to have pleaded *any* aspect of the plan was in the Louisiana Courts...

PRIOR TO JUDGMENT!!!

(3) THE 1992 RULING OF THE PENNSYLVANIA SUPREME COURT REGARDING PEPSICO IS ***NOT RES JUDICATA*** AS TO FBT.

In her opposition, the Pennsylvania Insurance Commissioner goes to considerable lengths to assert that FBT did not contest the plan, *which is true.* The crux of the opposition brief is that FBT (which was not a party to the Pennsylvania proceedings during the years 1986 through 1992) is bound by that decision. This is actually a backward application of the doctrine of *res judicata.* Beacuse FBT did not submit to the jurisdiction of the Pennsylvania Courts during the formulation of the plan, *res judicata* does not apply.

Moreover, as we have set forth in our original brief, ***FBT is no Pepsico.*** The equities which (theoretically) may have been weighed in the Pepsico instance are not the same equities applicable to FBT, which waited for a decade before it received ***one red penny!!!***

The rehabilitator's effort to bind FBT to a totally foreign proceeding twists the doctrine of *res judicata* beyond recognition. The only judgment which is *res judicata* is the Louisiana judgment.

(4) IT WAS MUTUAL WHICH WAIVED THE PLAN BY *NEVER INCLUDING FBT* IN THE PLAN; MOREOVER, MUTUAL IS ESTOPPED FROM INVOKING A PLAN WHICH IT *NEVER PLEADED AS A DEFENSE IN THE LOUISIANA LITIGATION.*

In her opposition, the Pennsylvania Insurance Commissioner casts stones from a glass house. It was Mutual which waived the plan. It was Mutual which **NEVER** raised the plan in the Louisiana Courts. It was Mutual which **NEVER** included FBT as a recipient of the proportional payments made to all Class 4 Claimants. Because of its conduct, Mutual is estopped from looking to the plan in order to override FBT's constitutional rights.

When Mutual answered FBT's petitions in the Louisiana courts on June 20, 1988, it did not invoke the plan. (A-25, note 4). When FBT filed a motion for summary judgment, seeking policy limits ***and*** judicial interest, Mutual did not invoke the plan. (A-25, note 5). After judgment was rendered, Mutual did not object to the award of judicial interest. (A-25, note 6). While the appeals were pending, Mutual urged FBT to "...proceed within the Louisiana State Court System...", as opposed to the plan. (A-26, note 7). On two occasions, adjusters for Mutual and the rehabilitator wrote to FBT, suggesting that FBT's hardship application would be considered only after "...the underlying litigation has been resolved..." (A-26, note 9).

It was Mutual that waived the plan, as it had the right to do under Pennsylvania law. Mutual elected remedies. FBT was never a participant in the plan and never received any benefits from the plan.

(5) THE OPPOSITION DOES NOT CONTEST THE ANNOUNCEMENT THAT MUTUAL WILL SOON "...*EMERGE AS A FUNCTIONING INSURANCE COMPANY...*" AND THE SOLVENCY EXCEPTION APPLIES.

Mark our words: ***Mutual will soon reach solvency.*** These were also the words of Alexander Bratic, who so announced to all the world in January of 1995. (A-66 to A-68) At page 19 of her opposition, the rehabilitator recognizes the "solvency exception" and concedes that interest is payable if enough funds are generated to pay all claims of equal dignity.

Mutual does not retract Mr. Bratic's words and does not contest what he said. This is because Mr. Bratic spoke truthfully. This has been a successful rehabilitation and FBT is intitled to avail itself of the "solvency exception".

The suggestion that Mutual is still insolvent is deceptive and inconsistent with public announcements presently being made. Despite nine years of inactivity, Mutual continues to carry excessive reserves for losses, excessive reserves for IBNR[1], and unrealistic reserves for unauthorized reinsurance.

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[1] IBNR stands for "Incurred But Not Reported" claims. After almost 10 years of inactivity and protection, this number should be zero.

CONCLUSION

The law of this Court should be applied, and FBT's constitutional rights should be enforced. This is, first and foremost, a Full Faith and Credit case. Substantial other Constitutional issues have been raised throughout this litigation and support the granting of Certiorari.

Respectfully submitted:

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STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned Notary Public, personally came and appeared:

HENRY L. KLEIN

who after first being duly sworn, did depose and say that he has served upon the following parties, copies of this reply to the opposition filed by Mutual in connection with our application for writs to the United States Supreme Court, by placing same in the United States Mail, postage prepaid, on this 4th day of May, 1995:

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_____
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SWORN TO AND SUBSCRIBED
BEFORE ME, NOTARY, ON THE
_____ DAY OF _____, 1995.

_____
NOTARY PUBLIC